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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 146

ZEOLA MARTIN RIMBOW, SELENA J. THOMAS & L. F. HUCKABY, DOING BUSINESS IN THE FIRM NAME OF HUCKABY FUNERAL SERVICE,

Petitioners,

vs.

ROSE ESTHER RIMBOW, JESSE RIMBOW, JR., BESSIE MAE RIMBOW, MINORS, ACTING BY THEIR GUARDIAN AD LITEM, HENRY E. KAHN, HENRY L. THOMPSON AND A. B. GERLAND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS, AND BRIEF IN SUPPORT THEREOF.

F. S. K. WHITTAKER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 146

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FIRST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

To the Honorable the Supreme Court of the United States:

Your petitioners, Zeola Martin Rimbow, Selena J. Thomas and L. F. Huckaby, doing business in the firm name of Huckaby Funeral Service, sometimes being referred to as Huckaby Funeral Home, respectfully show in this petition for issuance of the writ of certiorari to the

Court of Civil Appeals, First Supreme Judicial District, at Galveston, Texas, the following:

A

Summary Statement of the Matter Involved

1. Present Status of the Case and Salient Facts

Petitioners, Zeola Martin Rimbow, Selena J. Thomas and L. F. Huckaby, operating under the firm name of Huckaby Funeral Service, set out the following facts, to show this Court, how this present action arose:

Jesse Rimbow, Sr., in one of the six district courts of Harris County, Texas, having original jurisdiction of divorce causes,[1] on February 11, 1944, filed suit for a divorce, against his wife, Rose Esther Rimbow, one of the respondents, in cause docketed as, *Jesse Rimbow* v. *Rose Esther Rimbow,* No. 301,101, 61st District Court. In this suit alleging for divorce, he set out one of the statutory grounds,[2] and requested the court to grant him custody of minor son, age 8 years at that time, being the issue of the marriage with his wife, Rose Esther Rimbrow (R. 74-77). He appears here as Jesse Rimbow, Jr., with his guardian ad litem Henry E. Kahn, respondent. Service of process was had by publication on the defendant in the form and manner as required by law,[3] upon his taking oath, that he did not know the residence of his absent wife (R. 78-80). Upon due returns made by the Sheriff, showing proper serv-

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[1] Art. V, Sec. 8, Texas Constn.

[2] Vernon's Civ. St., Art. 4628.

[3] Vernon's Texas Rules of Civil Procedure Rule 109, Rule 116, Rule 117, as promulgated by Supreme Court pursuant to Ch. 25 Acts of Leg. 46th, as amended through December 31, 1941. All Rules of Civil Procedure referred to in this petition are based upon this authority. See Jurisdiction-Status, 10 Texas Law Rev. 513.

ice of process in accordance to law, upon no appearance being made by the defendant in person or attorney of her own selection, the court in accordance with Rule 244,[4] appointed an attorney ad litem, practicing in that court, to appear and defend the case on behalf of the absent defendant cited by publication (R. 78-80). On March 30, 1944, after trial before the court, no jury being demanded, upon personal appearance of plaintiff Jesse Rimbow and his attorney, and the absent defendant, wife, being represented by attorney ad litem, the court granted the divorce[5] and awarded custody of the minor Jesse Rimbow Jr. to his father, the plaintiff (R. 73).

On April 2, 1944, the plaintiff Jesse Rimbow Sr., was duly married to the respondent Zeola Martin Rimbow, and lived with him as his wife, until he died April 10, 1944, from the effects of an accident suffered at the place of his employment. (R. 137.)

She secured the firm, Huckaby Funeral Service to take charge of the body of her husband and prepare for his burial. Being without funds for this purpose she made the contract to pay firm $875.00, and delivered three insurance policies, to secure the firm in burying her husband. The petitioners, Selena J. Thomas and L. F. Huckaby, owners of the firm, accepted these policies from the proceeds of which they were to reimburse themselves. (R. 127, 136-138.) On policy for $1000, issued by the Equitable Life Assurance Society of the United States, which company,

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[4] Vernon's Texas Rules of Civil Procedure.

[5] Vernon's Civ. St. art. 4632 (4632-3). Suit shall not be heard or divorce granted before the expiration of thirty days after the same is filed. In all such suits the defendant shall not be compelled to answer upon oath nor shall the petition be taken as confessed for want of answer, *but the decree of the court shall be rendered upon full and satisfactory evidence,* upon the judgment of the court affirming material facts alleged in the petition. Either party may demand a jury. (Acts 1873, May 27, p. 117; P.D. 3459: Acts 1913, p. 183, sec. 1).

admitted liability, but filed suit, July 13, 1944 in the 61st District Court of Harris County, Texas, in cause No. 305,-934, in which the petitioners and respondents were named as parties asserting claims to the proceeds of the policy. (R. 26-30.) In like manner because of conflicting claimants to the proceeds of two policies issued on the life of Jesse Rimbow Sr. deceased, the Universal Life and Accident Insurance Company filed suit in the same court on June 13, 1944, admitting liability on the two policies totaling, net 531.80, being styled as cause No. 304,950. (R. 43-45.) The claimants being the petitioners and respondents here. Respondent Rose Esther Rimbow claimed these proceeds as the surviving widow of the deceased, Jesse Rimbow Sr., and Zeola Martin Rimbow, claimed the proceeds of these policies as surviving widow of deceased, Jesse Rimbow Sr., subject to the claim and lien on said policies to the Huckaby Funeral Service for their bill for burying the deceased, which was still unpaid in the amount of $875.00 (R. 30-34: R. 48-49). The American Rolling Mill Company, owner of the company which employed Jesse Rimbow Sr., deceased, at which place he received injuries which resulted in his death, was permitted to intervene and place $260.54 as back salary for raise granted under order of War Labor Board February 9, 1944 (R. 23-25). The order became finally payable some time in April, 1944 (R. 72). This was for the same purpose of resolving the claims of the conflicting claimants, petitioner Zeola, and respondents.

Jesse Rimbow having died from effects of injuries received on his job at Sheffield Steel, Zeola Martin Rimbow, Rose Esther Rimbow claimed the widow's portion of the workmen's compensation insurance together with two minor respondents herein claiming together one-half of the balance of such proceeds, and in the cause styled, Jesse Rimbow (dec'd) employee vs. The American Rolling Mill Company, employer, American General Insurance Company, insurer,

No. D-20014, before the Industrial Accident Board, the Board on July 10, 1944, denied the claim of the respondent Rose Esther Rimbow as widow and held in favor of Zeola Martin Rimbow as widow entitled under Texas laws to one-half of the insurance (R. 61). Thereafter within time required by law she filed suit against the compensation insurance carrier, The American General Insurance Company, to set aside the award and for trial de novo, in one of the district courts of Harris County, Texas, as No. 306,439, *Rose Esther Rimbow, et al.*, v. *American General Insurance Co., et al.* (R. 35-38). Zeola Martin Rimbow, petitioner, appeared in that suit by answer and cross-action claiming the compensation insurance proceeds as to one-half thereof due her as widow of her deceased husband Jesse Rimbow, Sr. (R. 41-42). The insurance carrier, American General, appeared, answered and admitted liability and its willingness to pay any of the contesting claimants as should be found entitled to such proceeds (R. 38-41). The rest of the respondents were made parties to this suit.

Rose Esther Rimbow, respondent, the former wife of Jesse Rimbow, the plaintiff in divorce suit, who secured his divorce on March 30, 1944, in cause styled *Jesse Rimbow v. Rose Esther Rimbow,* 301,101, in the 61st district court of Harris County, Texas (R. 73), in order to establish her right as widow of the deceased Jesse Rimbow, Sr., so as to be eligible to obtain one-half of the compensation insurance benefit due to the estate of Jesse Rimbow, Sr., and the proceeds of the insurance policies above described, on May 3, 1944, filed her motion for new trial of the divorce suit, which was amended January 5, 1945 (R. 81), and filed her second amended motion for new trial, upon which trial was had (R. 3-15). This respondent sought a new trial of the issues in the former divorce suit,

in which her husband had secured his divorce, upon service of process by publication on his absent wife, whom he alleged had abandoned him while living in Houston on December 28, 1943, and had not seen or heard of her since, and after diligent efforts to locate her could not find where she was, and in accordance with laws of Texas, it was necessary to cite the defendant by publication (R. 77-78). At the trial, the defendant so cited did not appear in person or by attorney of her selection, and upon due hearing, the divorce was granted and custody of the minor son, Jesse Rimbow, Jr., respondent, awarded the plaintiff (R. 73). This second amended motion of Rose Esther Rimbow for new trial was filed in the same court, where the original divorce suit was filed, under the same number and style, and heard by the same judge who granted the divorce in the manner stated as required by the Texas Rules of Civil Procedure, No. 329, formerly Art. 2236, Section 1 (Rev. Civ. St. of Texas, 1925), which so far as material here reads as follows:

> "Rule 329.[6] Motion for New Trial on Judgment Following Citation by Publication
>
> In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:
>
> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases."

Before trial was had on this motion as amended by the respondent Rose Esther Rimbow, by appropriate order upon

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[6] Vernon's Texas Rules of Civil Procedure. Also Vernon's Civ. St. art. 2236 (Texas).

motion the district court consolidated the insurance cases, with the original divorce suit, under Rule 174.[7] These cases being, *Jesse Rimbow, Jr., et al.* v. *American General Insurance Company et al.*, No. D-306,439 in 80th District Court of Harris County, Texas; *Equitable Life Assurance Society of the United States* v. *Rose Esther Rimbow et al.*, No. 305,934, 61st District Court of same county, and the *Universal Life and Accident Insurance Company* v. *Rose Esther Rimbow et al.*, No. 304,950 (R. 21-22).

It was undisputed that Jesse Rimbow, Sr., was dead and he was the plaintiff in the original divorce suit, in which was filed the second amended motion by the respondent Rose Esther Rimbow, who was the defendant in the original action. It was also conceded that under the laws of Texas,[8] there was no necessity for an administration to be had on the estate of the said deceased, and that he died intestate (R. 18).

There was no issue regarding the eligibility of the minor, Besse Mae Rimbow, and the minor, Jesse Rimbow, Jr., to participate in the estate of their deceased father, Jesse Rimbow, Sr., who are appearing in this Court through their guardian *ad litem* Henry E. Kahn as respondents. But it was vigorously contested by the petitioners here that the subsisting valid judgment of divorce, obtained as stated, on March 30, 1944, against the defendant wife, Rose Esther Rimbow (R. 73), and that by reason of said divorce she had no insurable interest at the time of the death of deceased Jesse Rimbow, Sr., on April 10, 1944, which was not disputed, as she was not his wife at the time of his death. See R. 31-32, amended answer of petitioner Zeola Martin Rimbow to the *Equitable Life Assur-*

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[7] Vernon's Texas Rules of Civil Procedure, same as Federal Rule 42, Federal Rules of Civil Procedure of 1938.

[8] Vernon's Ann. Civ. St. Art. 3356.

ance Society of U. S. v. *Rose Esther Rimbow et al.*, No. of Record 26-30, also petitioners Huckabys R. 32-46. See petitioner's answers to the cause, *Rose Esther Rimbow et al.* v. *American General Insurance Company*, No. 306,439, R. 41-42, original petition of plaintiffs in this cause appearing at R. 35-38. See also petitioners, L. F. Huckaby, Selena J. Thomas as Huckaby Funeral Service, reply to *Universal Life and Accident Insurance Company* v. *Rose Esther Rimbow et al.*, No. 304,950 R. 43-45, appearing at pages 45-47 of Record and petitioner Zeola Martin Rimbow's answer at pages 48-49 of Record. It was conceded by respondents that the proceeds of the policies described in the Universal Life and Accident Insurance Company, *supra,* were payable to the estate of Jesse Rimbow, Sr., deceased; also the proceeds of the Equitable Assurance Society's policy were payable to the named beneficiary Rose Esther Rimboow as wife, and if she failed then payable to the surviving wife of the deceased Jesse Rimbow, Sr. (R. 143).

It was stipulated that $260.54 was the correct net amount due from the American Rolling Mill Company to the estate of Jesse Rimbow, Sr. R. 143, see petition for intervention this company at pages R. 23-25). It was not denied by the petitioners that the home place known as 4309 Lillie Street in Houston, Texas, was the former home of Jesse Rimbow, Sr., and his former wife, Rose Esther Rimbow, in which she had a one-half interest as belonging to the community, and which was not partitioned at the time the divorce was granted to Jesse Rimbow, Sr., but that the petitioner Zeola Martin Rimbow was entitled to a life estate interest in an undivided one-half which belonged to the deceased, Jesse Rimbow, Sr., her husband at the time of his death on April 10, 1944 (R. 17-19). It is not disputed here that the workmen's compensation insurance, carried by the American General Insurance Company, as

insurer for Jesse Rimbow, Sr.'s employers, under Texas laws are payable to the estate of Jesse Rimbow, Sr., and are payable one-half to the widow of the deceased Jesse Rimbow, Sr., and remaining one-half to the minor children of the deceased, Jesse Rimbow, Jr., and Bessie Mae Rimbow, respondents herein. Petitioner Zeola Martin Rimbow claimed such one-half as the widow of the deceased Jesse Rimbow, Sr. (R. 17-19).

Prior to the trial on the merits, the Universal Life & Accident Insurance Company, in cause No. 304,950, paid into the registry of the court $531.80, its admitted liability on the two insurance policies issued on the life of the deceased, Jesse Rimbow, Sr., and after allowance of $50 attorney's fees it was discharged from further liability (R. 60). In like manner the Equitable Life Assurance Society of the United States, in cause No. 305,934, paid $935.00 into registry of the court after an allowance of $15 court costs and $50 attorneys fees was discharged from further liability (R. 60-61). Later the American General Insurance Company, the compensation insurance carrier in cause No. 305,934, paid an approved lump sum settlement of its admitted liability on its policy in the amount of $5,637.58 into the registry of the court and was discharged from further liability (R. 61-62). The American Rolling Mill Company, upon its plea of intervention admitting an indebtedness on the back wages of the deceased Jesse Rimbow, Sr. (R. 23-26) paid $260.54 as the admitted amount due the estate of Jesse Rimbow, Sr., into the registry of the court and was discharged from further liability (R. 63-64). The total amount then in the registry of court for the claimants of the estate of Jesse Rimbow, Sr., was $7,314.92 (R. 64).

Rose Esther Rimbow, respondent, in order to establish her claim to participate in the estate of the deceased Jesse Rimbow, Sr., as the 'surviving widow'' of the said deceased

found it essential to retry the judgment for divorce obtained against her by her former husband prior to his remarriage and death, filed her Motion for New Trial of the divorce suit under Rule 329,[9] in order, if successful in obtaining judgment in her favor on the divorce suit, then with her status of wife restored retroactively, she would then be the "wife" of Jesse Rimbow, Sr., at the time of his death, and his "surviving widow" with her insurable interest in the insurance proceeds, with one-half interest in the compensation insurance proceeds, with other rights to the deceased's estate as his lawful widow (R. 35-38). See also this respondent's second amended motion for new trial. (R. 3.)

In this motion (R. 14) she says:

> "Defendant and cross plaintiff alleges that by reason of the foregoing facts she is entitled to judgment by this court setting aside and holding for naught the judgment herein rendered by this court dissolving the bonds of matrimony between her and Jesse Rimbow, Sr., deceased, *and be adjudged to be the surviving widow of the said Jesse Rimbow, Sr., deceased,* and to *grant her a new trial,—*" (Italics added).

Again at R. 15, she says:

> "This motion for a new trial is brought under the provisions of and as provided for by Rule No. 329 of Vernon's Texas Rules of Civil Proceedure." (See page 6 supra, for pertinent portion of this rule.)

The trial was had before the court without the intervention of a jury, upon the amended motion for new trial of respondent, Rose Esther Rimbow, of the original divorce suit, *Jesse Rimbow, Sr.* v. *Rose Esther Rimbow,* 301,101, with which had been consolidated the insurance cases, under

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[9] Vernon's Texas Rules of Civil Procedure, see also supra p. 6 and note 6, page 7, supra.

Rule 174[10] (R. 22). The said motion (R. 3-15) for new trial of the divorce suit, and the merits of the divorce suit were taken together by the trial court under Rule 329.[11]

Petitioner Zeola Martin Rimbow filed her motion to dismiss second amended motion for new trial of the divorce suit as filed by respondent Rose Esther Rimbow, on the grounds that the court had lost jurisdiction over the subject-matter of said motion by the prior death of Jesse Rimbow, Sr., which was admitted in such motion, and being for retrial of divorce suit under Rule 329, and such judgment of divorce could not be relitigated (R. 17-20). Secondly, that Rule 329 required citation to the interested party in the judgment for divorce, and as Jesse Rimbow, Sr., was the only person interested in the divorce and being dead, the court cannot acquire jurisdiction over the such party as the proper party to the divorce proceeding (R. 20). The trial court refused the motion to dismiss, and heard evidence on the second amended motion of the respondent for a new trial of the divorce suit, together with the deceased Jesse Rimbow, Sr.'s original petition for divorce, granted the motion for new trial of the divorce suit, set aside the judgment rendered March 30, 1944 (R. 73), and then denied the petition of Jesse Rimbow, Sr. (R. 74-78), as filed on February 11, 1944, to dissolve the marriage between Jesse Rimbow, Sr., deceased and the defendant Rose Esther Rimbow (R. 58-59). The court saying:

> (R. 59: "On this the 29th day of January, 1945, came on to be heard and considered, defendant and cross-plaintiff, Rose Esther Rimbow's MOTION FOR A NEW TRIAL and to set aside the judgment heretofore rendered by this court DISSOLVING THE BONDS of MATRIMONY between Jesse Rimbow, deceased, and Rose Esther Rimbow, and CAME ALSO TO BE HEARD AND CONSIDERED, PLAINTIFF, JESSE RIMBOW,SR., DECEASED'S PETI-

[10, 11] Vernon's Texas Rules of Civil Procedure.

TION AND CAUSE TO DISSOLVE THE BONDS OF MATRIMONY between JESSE RIMBOW, SR., DECEASED, AND THE SAID ROSE ESTHER RIM—(R. 59).

(R. 59: * * * "And the court having heard the pleadings, evidence and argument of counsel * * * and finds for the defendant and cross-plaintiff Rose Esther Rimbow, on both said cause, and GRANTS SAID MOTION FOR NEW TRIAL AND NOW SETS ASIDE and holds for naught the judgment of this court heretofore rendered herein of date MARCH 30th, 1944, dissolving the bonds of matrimony between Jesse Rimbow, Sr., deceased, and the defendant and cross-plaintiff Rose Esther Rimbow. AND IT IS FURTHER considered by this court and SO ORDERED, ADJUDGED and DECREED by the court that the said JESSIE RIMBOW, SR., DECEASED'S petition and cause to dissolve the bonds of matrimony between him and the defendant and cross-plaintiff, Rose Esther Rimbow, be and the same is *her-* and now FOREVER DENIED, and that the defendant and cross-plaintiff, Rose Esther Rimbow, as to said suit for DIVORCE AGAINST HER BY JESSIE RIMBOW, SR., DECEASED, go hence without day; and it is further considered by this court and SO ORDERED, ADJUDGED and DECREED by the Court that the defendant and cross-plaintiff, ROSE ESTHER RIMBOW, be and is hereby ADJUDGED TO BE THE SURVIVING WIDOW OF THE SAID JESSE RIMBOW, SR., DECEASED, and that the CROSS-DEFENDANT ZEOLA MARTIN RIMBOW, is not the SURVIVING WIDOW OF JESSIE RIMBOW, SR., DECEASED" (R. 60).

After thus disposing of the divorce suit, then the court on the consolidated cases, denied petitioner Zeola Martin Rimbow, the widow of the deceased Jesse Rimbow, Sr., any recovery at all, nor did the court allow her to participate as a widow in the estate of her deceased husband as the result of the judgment rendered on the divorce action as shown. The respondents Jesse Rimbow, Jr. and Besse Mae Rimbow, minors, children of the deceased Jesse Rimbow, Sr., the attorneys A. B. Gerland, Henry E. Kahn and Henry L. Thompson, were awarded out of the $7,314.92

paid into the registry of the court (Tr. 65), respectively as follows: A. B. Gerland, $1,500, Henry E. Kahn, $1,000.00, Henry L. Thompson $200; Selena J. Thomas and L. F. Huckaby of firm of Huckaby Funeral Home, $475 for burial of decease (denying them their contract liens on the Equitable Policy, face amount $1,000 and Universal Life & Accident policies face amount $531.80, see their petitions Tr. 34-37, also Tr. 47-50, being $875), Bessie Rimbow and Jesse Rimbow, Jr., $1,034.98 each, and Rose Esther Rimbow, $2,069.96 and the home property as one-half with no right of partition so long as used as a home by her, with the other one-half undivided interest to the minor children, with the household furnishings of the deceased Jesse Rimbow, Sr., being awarded to Rose Esther Rimbow (R. 58-66).

In due course the petitioners here filed their motion for new trial, on May 5, 1945, which was amended and presented as amended motion for new trial (R. 50-57). Among other contentions, the petitioners urged that the court erred in refusing to grant the motion to dismiss the motion as amended of respondent Rose Esther Rimbow to retry the divorce case, after the plaintiff had died since obtaining such divorce judgment, the court had lost jurisdiction over the subject-matter and well as the plaintiff to that cause, and such fact of death being admitted, and known prior to the filing of such motion for new trial by respondent Rose Esther Rimbow, that the rendition of a judgment by a court without jurisdiction of the proper parties or subject matter, is not due process of law, and denies the equal protection of the law under Article 1, Section 19, of Texas Constitution and Section 1, of the 14th Amendment of the Federal Constitution (R. p. 53).

Secondly, that the action of the court in holding that Rule 329, Texas Civil Rules of Procedure (Vernon's) it could retry a divorce suit after the death of the deceased

plaintiff who obtained judgment granting his divorce, grant a new trial and then retry the divorce suit of the deceased, whose death is admitted, the court being without jurisdiction over the subject matter and proper party plaintiff, such Rule as construed and applied by the court in this case, is unconstitutional and violates Section 19, Art. 1 of Texas Constitution and 14th Amendment, Section 1 of the Federal Constitution (R. 53, 54).

Thirdly, that the failure of the court to enter judgment in favor of the respondent, Zeola Martin Rimbow, as widow of the deceased Jesse Rimbow, Sr., in accordance with the statutes of descent distribution of Texas, as to her interest in the policies set out in the *Universal Life & Accident Insurance Company* v. *Rose Esther Rimbow et al.*, No. 304,950, since the court did not have jurisdiction to retry the divorce suit, was taking property from her without due process of law and denial of the equal protection of the laws under Section 19, Art. 1 of Texas Constitution and Section 1, 14th Amendment to the Federal Constitution (R. 54).

Fourthly, That the failure to enter judgment in her favor in accordance with the terms of said insurance policy (*Equitable Life Assurance Society of U. S.* v. *Rose Esther Rimbow et al.*, No. 305,934), as the surviving widow of the deceased Jesse Rimbow, Sr., was taking property from her without due process of law and equal protection of the law under Section 19, Art. 1 of Texas Constitution and Section 1, 14th Amendment of Federal Constitution, as the court did not have jurisdiction to retry the divorce suit after the death of the plaintiff (R. 54).

Fifthly, That the action of the court in rendering judgment against her in the compensation insurance case (*Rose Esther Rimbow et al.* v. *American General Insurance Company*, No. 306,439), on the ground that she was not the surviving widow of deceased Jesse Rimbow, Sr., under the

undisputed facts to the contrary was error, and violated due process and equal protection of the law under Section 19, Art. 1 of Texas Constitution and Section 1 of the 14th Amendment to the Federal Constitution (R. 55).

Sixthly, The petitioners contended that the failure to render judgment in her favor (Zeola Martin Rimbow) as to her community funds represented in the $260.54 paid into the court by the American Rolling Mill Company as back salary of the deceased Jesse Rimbow, Sr., violated due process of law and equal protection of the law under Section 19, Art. 1 of Texas Constitution and Section 1 of the Federal Constitution (R. 56).

The trial court duly considered these claims of the violation of the Federal Constitutional rights of the petitioners and June 22nd, 1945, denied them, in overruling the amended motion of the petitioners for new trial, to which action of the court the petitioners in open court duly excepted and gave notice of appeal to the Court of Civil Appeals, First Supreme Judicial District, at Galveston, Texas. The trial court suspended the execution of the judgment, and granted supersedeas during appeal and disposition of the cause in the Supreme Court or Court of Civil Appeals (R. 68).

The required bond was filed and approved, staying and superseding action on the judgment pending appeal (R. 68).

Upon appeal to the Court of Civil Appeals at Galveston, for the first supreme judicial district, the cause was docketed and numbered as *Zeola Martin Rimbow, et al.*, Appellants, v. *Rose Esther Rimbow, et al.*, Appellees, from Harris County, No. 11,748. The same Federal questions were submitted to that court, and on November 29, 1945, judgment was rendered affirming the judgment of the trial court (R. 149). See opinion of the court (R. 144-149), now reported in 191 S. W. (2d) 89. Again the questions of violation

of the constitutional rights of the petitioners in judgment rendered by the trial court, and as affirmed by the Court of Civil Appeals in their motion for rehearing such Federal questions under Section 1 of the 14th Amendment were urged and the court refused such motion for rehearing (R. 149). See also page 150, Point 4, Point 5, page 151 of Record for reference to the Federal questions.

In due course an Application was made by the petitioners here to the Supreme Court of Texas, for a writ of error, being the highest court in Texas, and the same Federal questions showing violation of the petitioners' right to due process of law and equal protection of the laws were urged in this application. (See pages 159-160 of Record, also pages 170-171 of Record.)

The Supreme Court by its order entered February 6, 1946, denied the petitioners' application for writ of error to the Court of Civil Appeals, first district, Galveston, on the ground that there was no reversible error in the judgment of the Court of Civil Appeals for the first district at Galveston, Texas (R. 153).

Again these grave questions showing violation of the constitutional rights under the Federal Constitution, Section 1, 14th Amendment, of the petitioners were presented to the Supreme Court of Texas, in the petitioners' motion for rehearing on the application for writ of error to the Court of Civil Appeals, first district, Galveston, Texas (R. 174, 176-176 Motion for Rehearing on Application for Writ of Error), and in due course after due consideration by the Supreme Court, on March 6, 1946, ordered that the said motion be overruled. The proceedings having terminated, the action of the Supreme Court was duly certified to the said Court of Civil Appeals on March 9, 1946 (R. 154). The refusal of the Supreme Court of Texas to grant the application for writ of error made the judgment of Court

of Civil Appeals for the first district at Galveston, Texas, final in the State of Texas, on March 9, 1946.

The petitioners, in order to stay the issuance of the mandate from the Court of Civil Appeals to the District Court and stay execution thereon, duly filed their Motion to Stay Mandate and Execution on the judgment and to supersede execution thereon in the Court of Civil Appeals on March 15, 1946. The purpose being to stay such execution pending the presentation and determination of these grave constitutional questions under the Federal Constitution which were duly presented to the district court, said Court of Civil Appeals, and denied, and again urged as stated in the application for writ of error to the Supreme Court of Texas, which writ of error was refused, to the Supreme Court of the United States (R. 154).

The motion of the petitioners for such stay, execution and supersedeas on the final judgment of the Court of Civil Appeals for the first district at Galveston, Texas, was granted March 28, 1946 (R. 156). The required bond was duly filed and approved on April 4, 1946, making effective the order granting such motion (R. 156).

B

Reasons Relied On for the Allowance of the Writ

1. The action of the State court in rendering judgment in favor of the respondent defendant in the divorce action, and declaring her to be the "surviving widow" of the deceased plaintiff, and awarding to her the insurance proceeds, salary proceeds and property rights belonging to such "surviving widow", and denying to the petitioner Zeola Martin Rimbow, the widow of the deceased plaintiff, her interest as such widow due her in the insurance proceeds, salary proceeds and other property rights

in the deceased's estate as his widow, deprived her of her property rights, without due process of law, and denied to her the equal protection of laws, guaranteed to her, under the Fourteenth Amendment to the Constitution of the United States, in that:

A. The action of the State court in granting the new trial to respondent Rose Esther Rimbow, against whom the deceased plaintiff had secured his divorce by publication had in due form as required by law, and who at the trial thereof before the court without a jury, did not appear in person or by attorney of her own selection, and at which trial the court appointed attorney *ad litem* appeared, answered and defended on her behalf, and after obtaining this divorce, the plaintiff married the petitioner Zeola Martin Rimbow and who was his wife at the time of his death, and such fact being admitted in the respondent's motion for new trial, which was granted and the court retried the issues in the deceased's plaintiff original petition for divorce, and denied such deceased plaintiff's action for divorce and dismissed the same and then held the said respondent defendant to be the "surviving widow", such judgment being void as the court did not have jurisdiction of the subject-matter nor party plaintiff.

B. The action of the State court that under Rule 329, Vernon's Texas Rules of Civil Procedure, it could retry a former divorce suit after the death of the former plaintiff, and dispossess the petitioner Zeola Martin Rimbow of her property rights in the insurance, salary proceeds, and other rights accruing to her from the estate of her deceased husband, makes such rule 329,[12] as construed and applied to the facts in this case, vio-

[12] See note 6, page 6, also page 6 for the Rule.

late due process of law and deny to the petitioners due process of law and equal protection of the laws, as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

These questions were seasonably and properly raised in the trial court below, *and denied,* and properly urged in the Court of Civil Appeals for the First Supreme Judicial District at Galveston, Texas, and denied, and in the Application for Writ of Error and Motion for Rehearing on the application, and were by the refusal of the Supreme Court of Texas to grant the application for writ of error, made the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas, the highest court in the State of Texas, from which an opinion can be had.

Petitioners herewith present in support of the foregoing grounds for this application the accompanying brief setting forth in detail the precise facts and arguments in relation thereto. It is further submitted that this application is not filed for the purpose of delay but in good faith.

Prayer for the Writ

Wherefore your petitioners pray that this Court, pursuant to the United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Stat. 937, Section 344 (b) Title 28 U. S. C. A., issue a writ of certiorari to revise the judgment of the Court of Civil Appeals for the First Supreme Judicial District, at Galveston, Texas, affirming the judgment of the 61st District Court of Harris County, at Houston, Texas, deny your petitioners' amended motion for new trial. Upon refusal of the application for writ of error by the Texas Supreme Court, the said Court of Civil Appeals is the highest court in Texas in which a

decision in this case can be had. *Bacon* v. *Texas*, 163 U. S. 207, 16 S. Ct. 1023, 41 L. ed. 132.

All of which is respectfully submitted this the 10th day of May, 1946.

ZEOLA MARTIN RIMBOW,
SELENA J. THOMAS,
L. F. HUCKABY, d. b. a.,
HUCKABY FUNERAL SERVICE,
Petitioners;

By F. S. K. WHITTAKER,
Counsel for Petitioners.

F. S. K. WHITTAKER,
711 Prairie Avenue,
Houston 2, Texas.

UNITED STATES OF AMERICA,
The State of Texas,
County of Harris:

Before me the undersigned authority on this day appeared Selena J. Thomas, L. F. Huckaby, and Zeola Martin Rimbow, who being duly sworn, depose and say:

That they are the petitioners named in the foregoing Petition for Writ of Certiorari, that they have read the same and that all facts and allegations therein contained are true and correct.

ZEOLA MARTIN RIMBOW,
SELENA J. THOMAS,
L. F. HUCKABY.

Sworn and subscribed before me this the 10th day of May A. D. 1946.

A. L. HUCKABY,
Notary Public in and for Harris County, Texas. [SEAL.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 146

ZEOLA MARTIN RIMBOW, SELENA J. THOMAS & L. F. HUCKABY, Doing Business in the Firm Name of HUCKABY FUNERAL SERVICE,

Petitioners,

vs.

ROSE ESTHER RIMBOW, JESSE RIMBOW, Jr., BESSIE MAE RIMBOW, Minors, Acting By Their Guardian ad litem, HENRY E. KAHN, HENRY L. THOMPSON and A. B. GERLAND,

Respondents

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Opinion of the Court of Civil Appeals of First Supreme Judicial District, Galveston, Texas

The opinion of the Court of Civil Appeals for the First Supreme Judicial District, at Galveston, Texas, in the cause, *Zeola Martin Rimbow et al., Appellants* v. *Rose Esther Rimbow et al., Appelles,* No. 11,748, is reported in 191 S. W. (2d) 89, also it appears in the record filed in this cause (R. 144-149).

Jurisdiction

The statutory provision appears in United States Judicial Code, Section 237b, as amended by Act of February 13, 1925, 43 Stat., 937; Section 344(b) Title 28 U. S. C. A.

2

The Court of Civil Appeals, for the First Supreme Judicial District, Galveston, Texas, on November 29, 1945, affirmed the judgment of the trial court, known as the District Court of Harris County, 61st Judicial District of Texas (R. 149). Motion for rehearing (R. 149-153) was filed within the time provided by the Rules of the Courts of Civil Appeals, and on December 20, 1945, was refused by this Court of Civil Appeals (R. 153). In due course the petitioners filed their application for writ of error in the Supreme Court of Texas to revise and reverse the judgments of the said Court of Civil Appeals and the trial court,[1] and was by that Court, on February 6, 1946, refused the application on the ground that the application presented no error which required reversal of the judgment of the Court of Civil Appeals (R. 154). Motion for rehearing[2] of the application for writ of error was duly filed by the petitioners in this Court and was refused on March 6, 1946 (R. 154). This terminated proceedings in the Supreme Court of Texas,[3] and the action of this Court was duly certified to,

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[1] See certified copy of Application for Writ of Error in Supreme Court of Texas.

[2] See certified copy of Motion for rehearing on application in the Supreme Court of Texas.

[3] Vernon's Tex. Rules of Civ. Procedure, Rule 484:

"• • • At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of such motion • • • the clerk of Supreme Court shall transmit • • • certified copies of the orders • • •

and received by the Clerk of the Court of Civil Appeals on March 9, 1946 (R. 154). The effect of the refusal of the application for writ of error, and the overruling of the motion for rehearing, made the judgment of the Court of Civil Appeals, final as of the date of receipt of certified copy of the orders of the Supreme Court in the Court of Civil Appeals, which was March 9, 1946 (R. 154).

Petitioners in due course on March 15, 1946, filed their motion to stay mandate, execution and for supersedeas of the judgment of the Court of Civil Appeals, which had become final (R. 154), pending application for writ of certiorari to this Court, and final disposition thereof in this Court. This motion was granted March 28, 1946 (R. 156), and became effective upon the filing and approval of the required bond, April 4, 1946 (R. 156). The opinion of the Court of Civil Appeals being the highest court in Texas, so far as this case is concerned from which an opinion can be had. *Bacon* v. *Texas,* 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132.

3

The nature of this case and the rulings below in the State courts bring it within the jurisdictional provisions of Section 237b, *supra,* and shall more fully appear from the following:

The petitioners in their amended motion for new trial specifically raised a Federal question of substance not theretofore determined by this Court, and other Federal questions of substance were decided by the trial court not in conformity with the applicable decisions of this Court (R. 52-56), and after due consideration by the trial court were overruled(R. 67-68). They were submitted to the Court of Civil Appeals, and that court affirmed the judgment of the trial court (R. 149) thus approving the action of the court in denying the motion for new trial in which

these questions were involved. In the motion for rehearing filed in the Court of Civil Appeals (R. 150-151) these Federal questions were urged and denied (R. 153). Petitioners then set out these Federal questions of substance in their application to the Supreme Court of Texas, for writ of error,[4] and again urged them upon refusal to grant the writ (R. 153) in their motion for rehearing[5] and denied by that court's overruling such motion (R. 154). The claims as to the Federal questions made by your petitioners in the State courts and denied, are:

1. That the court did not have jurisdiction to grant a motion for new trial and to retry a divorce suit, after a judgment had been obtained against the defendant by publication in due form according to law, after the death of the plaintiff, being admitted on such motion filed by the defendant for retrial, because:

a. Death removed the subject-matter of the cause from the jurisdiction of the court.

b. Deceased plaintiff, as the proper party, could not appear, death made it impossible for the court to have necessary parties.

c. The rendition of the judgment after granting such motion, and retrying the divorce on the original petition of the deceased plaintiff and denying such deceased plaintiff his divorce, is not due process of law and denies the equal protection of the law in Section 1, 14th Amendment to the Federal Constitution.

2. The court holding that under Rule 329, Vernon's Texas Rules of Civil Procedure, that it had jurisdiction to grant a new trial and retry such divorce, in which judgment was obtained in due form according to law by publication, after the admitted death of the plaintiff who prevailed, and under that Rule could retry

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[4] Certified copy of Application.

[5] Certified copy of Motion for rehearing.

the divorce on the deceased plaintiff's original petition and deny his divorce,

a. That the court not having jurisdiction of subject-matter nor the proper parties, made such Rule as so construed and applied in this case unconstitutional, being in violation of Section 1, 14th Amendment to the Federal Constitution.

3. That the action of the court granting the motion and retrying the divorce, after judgment in due form had been secured by plaintiff, who had since married and lived with his wife until his death, and after a denial of the divorce to such deceased plaintiff, then render judgment holding that the former divorce- wife is the surviving widow and granting her the widow's portion of the impounded insurance funds and other property rights of the deceased plaintiff's estate, and denying the petitioner widow her property rights in her deceased husband's estate and in the insurance proceeds, was taking property from such petitioner without due process of law and denying to her the equal protection of the law under the Federal Constitution, Section 1, 14th Amendment.

Rule 329 [5a] Vernon's Texas Rules of Civil Procedure, referred to above reads as follows:

"Rule 329. Motion for New Trial on Judgment Following Citation by Publication

In cases in which judgment has been rendered on service of process by publication, where the defendant

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[5a] Formerly Art. 2236, Vernon's Tex. Ann. Civ. St. which see for complete annotations and historical notes.

Art. 2236, idem, called Bill of Review, sections (a) and (c) of Rule 329, supra, are the same as Art. 2236, subdivisions 1 and 3; (b) is the same as subdivision 2 of Art. 2236, except for amount of bond to be fixed in accordance with Rule 364, Vernon's Tex. Rules of Civ. Procedure relating to supersedeas bonds. Otherwise Rule 329 is an exact re-enactment of former Art. 2236. See Vernon's Texas Rules of Civil Procedure by Franki (1942) pages iii to xxxvii and House Bill 108, 46th Leg. (Texas) granting the Supreme Court of Texas authority to make rules of civil procedure now known as Ch. 25 of Acts of the 46th Leg.

has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases.

(b) Execution of such judgment shall not be suspended unless the party applying therefor shall give a good and sufficient bond payable to the plaintiff in the judgment, in an amount fixed in accordance with Rule 364 relating to supersedeas bonds, to be approved by the clerk, and conditioned that the party will prosecute *his petition for new trial* to effect and will perform such judgment as may be rendered by the court should its decision be against him.

(c) If property has been sold under the judgment and execution before the process was suspended, the defendant shall not recover the property so sold, but shall have judgment against the plaintiff in the judgment for the proceeds of such sale."

Statement of the Case

Jesse Rimbow, Sr., deceased, prior to his death, filed suit for a divorce and custody of a minor son, Jesse Rimbow, Jr., one of the respondents here, setting out that the defendant Rose Esther Rimbow, respondent wife, had deserted him and their 8-year-old son on or about December 28, 1943, and that since she left he had not seen or heard of her nor knew where she was. He also alleged that he and his wife had lived in Houston since their marriage in 1934, until December 28, 1943, and that upon the ground of cruelty he was entitled to a divorce (R. 74-77). This suit was filed in one of the district courts of Harris County, Texas, the county of his residence, and upon his oath that the defend-

ant's residence was unknown to the plaintiff[6] (R. 77) citation was issued in due form, in compliance with the rules, for the absent defendant by publication.[7] Upon showing that the citation for defendant duly made, upon the return date, no answer having been filed by the defendant, an attorney *ad litem* was appointed[8] to represent her, and when the cause came on to be heard on March 30, 1944, he appeared and defended the cause for the absent defendant, and upon a trial before the court without a jury the plaintiff secured his divorce and was awarded custody of his minor son[9] (R. 73).

This case was styled as Jesse Rimbow v. Rose Esther Rimbow, No. 301,101, 61st Judicial District, Harris County, Texas. After securing his divorce, Jesse Rimbow, Sr., married the petitioner, Zeola Martin Rimbow, in Houston, on April 2nd, 1944 (R. 137). Later, on April 10, 1944 he died from the results of an accident injury received at his job in Houston, and the widow Zeola Martin Rimbow, petitioner, made the contract with the firm of Huckaby Funeral Service, operated and owned by L. F. Huckaby and Selena J. Thomas, petitioners here, and being without funds to pay the costs of such services delivered the three insurance policies described in the petitions of The Equitable Life Assurance Society of the United States v. Rose Esther Rimbow et al., No. 305,934 (R. 26-30) and Universal Life and Accident Insurance Company v. Rose

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[6] Rule 109 (Vernon's Tex. Rules of Civil Procedure) provides for citation by publication. (This rule was amended Feb. 1, 1946.)

[7] Rule 114, *idem*, sets out the requisites for citation by publication.

[8] Rule 244, *idem*.

[9] Art. 4632 (Vernon's Civ. St.), no divorce by default permitted in Texas. Art. 4639, *idem*, custody of children may be given father or mother as the court shall deem right and proper.

District courts are given original jurisdiction in cases of divorce and dissolution of marriage. Art. 1906, sec. 2 (Vernon's Civ. St.), Art. 4629, *idem*, set out the statuory grounds for divorce in Texas.

Esther Rimbow et al., No. 304,950 (R. 43--45), which cases were consolidated with the original divorce case on January 4, 1945 (R. 22). The manager of the funeral firm testified that such contract was made and that the widow, Zeola, agreed to pay $875.00 for the complete funeral service for her deceased husband, and that nothing had been paid on this bill at the date of the trial of this case (R. 126-127). The petitioner, Zeola Martin Rimbow, testified to the same effect (R. 137-138). The funeral firm in the Equitable case, supra, appeared in that case and claimed a lien on the policy there described for services rendered as stated (R. 32-33), which claim was admitted due the firm by petitioner Zeola in her answer to the same case (R. 30-31). In like manner a lien was claimed by this firm in the Universal case, supra (R. 45-47), which claim was admitted by petitioner Zeola (R. 48-49).

It was undisputed that Jesse Rimbow, Sr., having died from the results of accident received at his place of employment, the legal heirs of his estate were entitled to workmen's compensation insurance, which in this case was carried by his employer in the American General Insurance Company (R. 38-41). In this case it is not disputed that the minors, Jesse Rimbow, Jr., the sole issue of the first marriage with Rose Esther Rimbow, and Bessie Mae Rimbow, the issue of former marriage prior to the marriage with Rose Esther Rimbow, were entitled to participate in his estate as his children, and under the statutes of Texas were entitled to one-half of the proceeds of the compensation insurance, subject to the alleged claims for legal services on part of respondents, A. B. Gerland, Henry L. Thompson and Henry E. Kahn, the other one-half of the compensation insurance proceeds being payable to the widow of the deceased, Jesse Rimbow, Sr., who died intestate and that there was no necessity for administration upon his estate. The petitioner Zeola Martin

Rimbow filed her claim for the widow's one-half portion of such proceeds before the Industrial Accident Board of the State of Texas, which has jurisdiction to adjust claims and claimants to workmen's compensation insurance proceeds; also the respondent Rose Esther Rimbow put in her claim as the "widow" of the deceased Jesse Rimbow, Sr., and opposed the claim of petitioner Zeola. In due course the Board on July 10th, 1944, in the cause styled "Jesse Rimbow (dec'd), employee v. The American Rolling Mill Company, employer, American General Insurance Company, insurer, No. D-20014," in its final award and decision denied the claim of respondent Rose Esther Rimbow as widow of the deceased employee, and awarded one-half of the proceeds to the respondents minors, Jesse Rimbow, Jr., and Bessie Mae Rimbow, the children of the deceased employee and the other one-half to Zeola Martin Rimbow, respondents, as the lawful widow of the deceased employeee (R. 61-63). Respondent Rose Esther Rimbow being dissatisfied with the Board's decision, gave notice of appeal and in due course filed her suit in the district court of Harris County, Texas, seeking a trial de novo and setting aside of the award of the Board. This cause styled as Jesse Rimbow Jr. et el., v. American General Insurance Company, No. 306,439, which was later consolidated with the original divorce suit. (R. 22). In this cause, Rose Esther Rimbow, respondent, alleged that she had filed her motion for new trial of the original divorce suit under Rule 329, page 25, supra, on May 3rd, 1944, that contingent upon her success in that action she will be the "surviving widow" and entitled to the widow's portion of such compensation insurance proceeds, and she asked that the Board's order be reversed, denying her interest as widow in the insurance proceeds. (R. 36-38). Respondent Rose Esther Rimbow (R. 12-13) claimed the proceeds of the policies in the Universal Life and Accident Insurance,

case, supra page 28, and in the Equitable Life Assurance Society of United States, supra page 27, also the respondent minors, and petitioner Zeola Rimbow as the wife and lawful widow of the deceased Jesse Rimbow, Sr., and the petitioners L. F. Huckaby and Selena J. Thomas, under the firm, of Huckaby Funeral Service, to the extent of $875 for services rendered in burying the deceased, and the other respondents, Gerland and Thompson as attorneys. (R. 30-31, 41-42, 45-47).

Faced with this array of conflicting claimants, especially as to who as the lawful of widow the deceased Jesse Rimbow Sr., was entitled to the insurance proceeds, admitting liability, and upon the payment of the respective admitted amounts due into the registry of the court, the companies were released from further liability, as follows:

The Equitable Life Assurance Society	$935.00	(R. 60-61)
Universal Life & Accident Insurance Co.	$481.50	(R. 60)
American General Insurance Company	5637.58	(R. 63)
American Rolling Mill Company (back salary)	260.54	(R. 63-64)

Rose Esther Rimbow, in order to be adjudged the "surviving widow" of the deceased Jesse Rimbow Sr., filed her motion for new trial of the original divorce suit, in which her husband as plaintiff had secured his divorce from her and obtained custody of their minor son, Jesse Rimbow Jr., in the same court and under the same style and number, and was heard by the same judge who rendered the judgment granting the divorce to her husband, being, Jesse Rimbow Sr. v. Rose Esther Rimbow, No. 301.101, in the 61st Judicial District (R. 3-15). As her husband had secured his divorce, against her by citation issued upon publication, and as she did not answer or appear in person nor by an attorney of her own selection in order to retry the issues of such divorce suit, was required by Rule 329, Vernon's Texas Rules of Civil Procedure, (see

page 25 supra), where as here, it was filed within two years required by that rule. Trial was had before the same judge, who sat in the former divorce suit, under the second amended motion for new trial by the respondent Rose Esther Rimbow.

Before the trial on the merits, the petitioner Zeola Rimbow, the wife of the deceased Jesse Rimbow, Sr. whose divorce, after his death, his former wife by her motion as filed (R. 3-15) for new trial under Rule 329, filed her motion to dismiss this motion of the respondent on the grounds that the trial court, due to the admitted death of the former plaintiff to the divorce suit, had lost jurisdiction over the subject-matter and the party plaintiff and as death had already removed marital status, the sole subject matter of divorce suits, there was nothing for the court to act upon in said motion seeking a new trial and a relitigation of the issues for divorce, nor did the court under Rule 329 have jurisdiction to grant the motion for new trial and relitigate such issues for divorce. (R. 17-20).

This motion was not sustained and the trial court granted the respondents' motion as amended for new trial of the divorce suit, tried the case upon the deceased plaintiff's petition for divorce as originally filed in this court, and denied the deceased plaintiff's his divorce against the respondent defendant Rose Esther Rimbow, saying (R. 59):

> "And it is further considered by this court and so ordered, adjudged and decreed by the court that the said Jesse Rimbow, Sr., Deceased's Petition and Cause to dissolve the bonds of matrimony between him and the defendant, and Cross-Plaintiff, Rose Esther Rimbow, be and the same is her- now forever denied, and that the defendant and cross-plaintiff, Rose Esther Rimbow, as to said suit for divorce against her by Jesse Rimbow, Sr., deceased, go hence without day; and it is further considered by this court and so ordered,

adjudged and decreed by the court that the defendant and cross plaintiff, Rose Esther Rimbow, be and is hereby adjudged to be the surviving widow of the said Jesse Rimbow, Sr., deceased, and that the cross defendant Zeola Martin Rimbow, is not the surviving widow of Jesse Rimbow, Sr., Deceased." (R. 60.)

The petitioners in detail in their amended motion for new trial (R. 50-57) centered their attack on the lack of jurisdiction in the trial court to retry the issues of a divorce suit which judgment had been obtained by the successful plaintiff, who after marrying the petition-- Zeola Martin Rimbow, died, and since the motion came too late, the court erred in refusing to sustain the motion to dismiss as to the divorce action as filed for retrial under the respondent's motion for new trial as amended, and that the rendition of the judgment in favor of the respondent Rose Esther Rimbow in such action, in which the court did not have jurisdiction over the subject-matter or the party plaintiff, who was dead, such action violated the due process of law and equal protection of the laws (omitting the contention that it violated the state constitution) under the 14th Amendment, Section 1 of the Federal Constitution. That Rule 329, Vernon's Texas Rules of Civil Procedure (page 25 supra) as construed and applied to the facts of this case violated due process of law and denied the equal protection of the laws under Section 1, 14th Amendment to the Federal Constitution (R. 52-56). That the court not having jurisdiction to retry the divorce case, its judgment denying petitioner Zeola Martin Rimbow her property rights in the proceeds of the insurance policies and salary proceeds of her deceased husband, to which she was entitled under the statutes of descent and distribution, was taking of the property from her without due process of law, and denying to her the equal protection of the laws

under Section 1 of the 14th Amendment to the Federal Constitution (R. 54-56).

The trial court after due consideration of the issues raised under the Federal Constitution overruled petitioners' amended motion for new trial (R. 67-68) to which exceptions were duly taken and notice of appeal was given in open court to the Court of Civil Appeal, first supreme judicial district at Galveston, Texas (R. 68). The same questions of violation of the petitioner's federal rights under the United States Constitution were urged and denied by the Court of Civil Appeals; and again urged in the motion for rehearing before that court and were refused (R. 150-151). The judgment of the Court of Civil Appeals was rendered affirming the action of the trial court in refusing the petitioners' motion as amended for new trial (R. 149); see also opinion of the court (R. 144). The petitioners then sought a review of the Court of Civil Appeals' judgment in their application for writ of error, in which these federal constitutional questions were urged[10] before the Supreme Court of Texas, and that Court on February 6, 1946, refused such writ on the ground of no reversible error in the appeal court's judgment (R. 153). Petitioner's motion for rehearing[11] was refused (R. 154) on March 6, 1946. The opinion of the Court of Civil Appeals being the highest court in Texas in which an opinion can be had, and having exhausted all remedies in the State of Texas, this cause comes to the United States Supreme Court for correction and revision of the errors of the courts below in regard to the Federal questions raised. The Court of Civil Appeals granted stay of mandate and execution on its judgment, and granted

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[10] See certified copy of Application for Writ of Error.

[11] See certified copy of Motion for Rehearing on application.

supersedeas pending disposition of this case in this Court (R. 154-156).

ARGUMENT

1

Where the purpose and effect of a procedure in a court is to set aside and relitigate the issues which resulted in a judgment previously obtained in the same court, due process of law as guaranteed by the Fourteenth Amendment requires the court at the time the new trial is granted to have jurisdiction over the subject-matter and of the parties to the same extent as when the original judgment was entered.

2

Where the court, notwithstanding, has lost jurisdiction of the parties and the subject-matter to the same extent as when the original judgment was entered, grants such new trial, and the judgment entered thereon is given conclusive effect to divest petitioners in the consolidated cases, of their property rights, such action is not due process of law and denies to them the equal protection of the laws as guaranteed under the Fourteenth Amendment.

(a) Where the state courts claim jurisdiction to so act in this case under Rule 329, Vernon's Texas Rules of Civil Procedure, which as material here reads:

> "Motion for New Trial on Judgment Following Citation by Publication
>
> "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:
>
> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after

> such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases."

such Rule as construed and applied in this case violates due process of law, and denies to the petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment and is void.

The foregoing may be a fair statement of the constitutional questions involved in this case as claimed by the petitioners in the courts below and denied, and this Court having the paramount power to determine such questions under the Federal Constitution is not precluded by judgments to the contrary elsewhere, as will be fully set forth herein.

The respondent Rose Esther Rimbow, in order to establish any interest in the insurance policies described in *Universal Life and Accident Insurance Company* v. *Rose Esther Rimbow, et al.*, No. 304,950, and *Equitable Life Assurance Society* v. *Rose Esther Rimbow, et al.*, No. 305,934, and the compensation insurance proceeds as set out in *Jesse Rimbow, Jr., et al.* v. *American General Insurance Company*, No. 306,439, filed her motion to consolidate these cases (Tr. 24) with the original divorce case known as *Jesse Rimbow, Sr.*, v. *Rose Esther Rimbow*, No. 301,101, in the 61st Judicial District Court of Harris County, "in which latter cause Rose Esther Rimbow has filed her motion for a new trial under provisions of Rule 329 of Vernon's Texas Rules of Civil Procedure" *(supra,* p. 26). By this motion and the order entered by the court, consolidating these insurance cases (R. 22), the respondent concedes, as fully disclosed by her second amended motion for new trial (R. 3-15), that unless she prevailed on her motion so filed in getting a new trial of the divorce suit and obtaining judgment thereon in her favor, denying the divorce, she

would not be entitled to any right in the proceeds of the insurance policies set out in the consolidated cases. Also respondent Rose Esther Rimbow concedes that the $250.54 paid into the registry of the court, which represents retroactive salary increase awarded on February 9, 1944, by the Eighth Regional War Labor Board (R. 23-24) which became effective some time in April, 1944, being payable to the estate of Jesse Rimbow, Sr. (R. 72), she would have no interest unless she succeeded in her motion as stated. It is also conceded here that the home property described in the respondent's second amended motion for new trial (R. 14) was acquired and paid for by Jesse Rimbow, Sr., while married to Rose Esther Rimbow, and at the time of the divorce constituted their community property in which his then wife had one-half interest, and that after the divorce was granted on March 30, 1944 (R. 73), no request for partition having been made by the plaintiff, Jesse Rimbow, Sr., in his original petition (R. 74), the trial court in his decree did not dispose of any of the property rights of the parties (R. 73). In this motion as filed for a new trial she requested a homestead interest in this property for life (R. 15).

It is not disputed here that the deceased plaintiff, Jesse Rimbow, Sr., obtained his divorce and custody of his minor son, Jesse Rimbow, Jr., who was at that time about 8 years old, by citation of process by publication upon the absent spouse Rose Esther Rimbow, according to the rules of the court and in conformity therewith, and it also not disputed here, that the defendant never appeared personally nor by an attorney of her own selection, and that an attorney was appointed by the court to represent the absent defendant cited by publication, who duly appeared, answered and defended in her behalf (R. 81). This plaintiff at the trial before the court on March 30, 1944 obtained judgment of

divorce from the defendant, Rose Esther Rimbow, and custody of his minor son, Jesse Rimbow, Jr. (R. 73).

It is also not disputed here that Jesse Rimbow, Sr., after securing his divorce on March 30, 1944 from respondent Rose Esther Rimbow, married the petitioner Zeola Martin Rimbow on April 2nd, 1944, in Houston, Texas, and lived together as husband and wife, until his death on April 10, 1944 (R. 126-127, 137-139) and then she made the contract with the petitioners' funeral firm to bury her husband and being without money, delivered to them under the contract for burial, three policies, the two in the Universal Life and Accident Insurance Company (R. 45-47) and the Equitable Life Assurance Society of U. S. (R. 32-35).

Since the respondent Rose Esther Rimbow had no legal claims on the estate of Jesse Rimbow, Sr., as his widow, at the time of his death, because of the divorce previously granted on March 30, 1944 prior to his death, and as she had been cited by publication and had not appeared in person or by attorney of her own selection it was mandatory to file her motion for new trial under Rule 329, supra p. 26, to get a new trial of the divorce suit and after getting such new trial to prevail, so that she would be declared the "surviving widow" of the deceased Jesse Rimbow, Sr., to the same full force and effect, as if the deceased had never filed suit for divorce against her and had never obtained judgment of divorce. The petitioners properly challenged the jurisdiction of the court to grant such motion for new trial in the trial court below (R. 17-20) and again in great detail in their amended motion for new trial showing such action violated petitioners' rights under Section 1 of the 14th Amendment to the Federal Constitution (R. 52-56), which was overruled by the trial court and exceptions reserved (R. 67-68) and urged in the Court of Civil Appeals and denied (R. 149) and on motion for rehearing in that

court again urged and refused (R. 153). Opinion of Civil Appeals Court (R. 144-149), and upon refusal of application for writ of error (R. 153) the judgment of the Court of Civil Appeals became final. The trial court granted the motion as prayed for, retried the divorce on the deceased's original petition and denied the divorce, decreed that the respondent Rose Esther Rimbow was the "surviving widow" and entitled to the her interest as widow in the estate of the deceased Jesse Rimbow, Sr., refused to award petitioner Zeola Martin Rimbow her interest in the proceeds of the policies and other assets of the estate as his lawful widow, and refused to recognize the liens of petitioners L. F. Huckaby and Selena J. Thomas doing business under the firm name of Huckaby Funeral Service, on the insurance policies, and arbitrarily awarded them $475 for burial expenses in lieu of their contract right to $875.00, and distributed the rest of the proceeds among the attorneys and minor children (Tr. 59-67).

1. The Jurisdiction of the Court Below

The respondent Rose Esther Rimbow filed her motions and as finally amended in what is designated as her second amended motion for new trial under Rule 329, supra, p. 26, after the undisputed and admitted death of her former husband, and within the two year period required by this rule, after judgment of divorce was obtained against her by publication, in which she made no personal appearance or by attorney of her own selection as required by that rule. That rule, being in fact and effect where the party can conform to its requirements, and as construed by the Texas courts, is nothing but a Motion for New Trial, and where a party has had a judgment rendered against him in manner stated, without personal appearance, answer or by attorney of his own selection, "the court may *grant a new trial* upon

petition of defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. *The parties adversely interested in such judgment shall be cited as in other cases.*" Petitioners contended in the state courts, that the judgment so obtained on March 30, 1944 (R. 73) by the deceased plaintiff, was simply one for divorce and custody of his minor son, and due to the death of the plaintiff, he being the only person interested in the divorce judgment, the court did not have jurisdiction over the subject-matter or such party (R. 17-20). The trial court refused to sustain this contention, granted the motion and retried the divorce case on the original petition of the deceased plaintiff (R. 74-77) denied the deceased plaintiff his divorce (R. 58-59) declared respondent defendant Rose Esther Rimbow to be the surviving widow and declared that Petitioner Zeola Martin Rimbow was not the surviving widow of her deceased husband, and denied to her any property interests in the insurance and salary proceeds and other assets of the estate of her deceased husband (R. 60-63). Denied the claim of $875 to the Huckaby Funeral Service, undertakers, and gave them $475, in lieu of the contract amount on policies assigned in the *Equitable* and *Universal Insurance* cases (R. 32-35, 45-47). In their amended motion for new trial, the petitioners contended that such action of the court violated due process of law under the 14th Amendment to the Federal Constitution, and took away their property rights without due process of law and denied to them the equal protection of the laws, and that the rule 329 so construed likewise violated the same provisions of the Federal Constitution and therefore void (R. 52-56). Rule 329," for-

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[12] Rule 329, Vernon's Tex. Rules of Civil Procedure, formerly Art. 2236 Vernon Ann. Civ. St., has been construed in the same manner as the Art. 2236, as being mandatory, and always treated as a motion for

merly Art. 2236, being a motion for new trial of the divorce suit, was so regarded and treated as such by the courts below. From the cases shown in the footnote, the settled construction of Rule 329 is the same as the former Art. 2236, as the Supreme Court of Texas in preparing the rule adopted the language of the statute, such rule when construed will be given the same effect, and the mandatory character of Art. 2236 will be applied to the Rule 329. Several of the Texas courts of civil appeals [13] have held that the power of the Supreme Court to make rules, when exercised, is the exercise of legislative power granted by the constitution [14] and when such rules are so established, they have the effect of statutes.

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new trial in the same case: *Wiseman* v. *Cottingham,* 107 Tex. 68, 174 S. W. 281, 282:

"It was but a continuation of the original suit, and did not possess the character of an independent action in equity to review the judgment. While the petition was styled a bill of review, it amounted to no more than a motion for new trial, permitted by virtue of the statute to be filed and heard after adjournment of the term."

See, *Smith, et al.,* v. *Higginbotham, et al.* (Tex. Civ. App.), 112 S. W. (2d) 770, 772; *Hunsinger* v. *Boyd,* 119 Tex. 182, 26 S. W. (2d) 905; *Dennis* v. *McCasland,* Tex. Comm. App., 97 S. W. (2d) 684.

Watts v. *City of El Paso* (Tex. Civ. App.), 183 S. W. (2d) 216, err. ref. *Deveraux* v. *Daube* (Tex. Civ. App.), 185 S. W. (2d) 736; *Harris* v. *Elm Oil Co.,* 183 S. W. (2d) 216, err. ref. construing Rule 329 in same manner as former Art. 2236, supra.

Smith, et al., v. *Higginbotham, et al.,* 141 S. W. (2d) 753, affirmed, 158 S. W. (2d) 481, 485, Supreme Court of Texas says: (Art. 2236 id.)

> "• • • When a motion for new trial in a case is granted in which judgment has been rendered on such service the case stands docketed *as between the Parties* in the same condition as if judgment had never been rendered.

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[13] *Brown* v. *Linkenhoger,* 153 S. W. (2d) 342 (Tex. Civ. App.) err. ref; *Bender* v. *Federal Underwriters Exchange,* 133 S. W. (2d) 214 (Tex. Civ. App.), err. dism'd.; *International & G. N. Ry.* v. *Parke,* 169 S. W. 397 (Tex. Civ. App.)

[14] Tex. Const., Art. 5, Sec. 25.

It would seem to follow, that since Rule 329, requires as construed by the Supreme Court of Texas, in case where a judgment as here, which involved only a divorce, after death of one of parties, a motion for new trial of such cause, would come too late, although filed within the two year limit required by the rule, for if the judgment is set-aside, there being no marital status of husband and wife existing, the subject of the controversy being eliminated by death, the court would have nothing to act upon. If the judgment is vacated or set aside the case cannot be retried, so that, where it appears to the court, when a new trial is asked, that it cannot have the "case in the same condition" as it had at the time the judgment was granted, the court will refuse to grant such motion, and where the court did grant such motion for new trial as in the principal case and relitigated the issues for divorce of dead man, such judgment or decree is absolutely void, as the court rendering it had no jurisdiction over the subject-matter nor did it have jurisdiction over both parties to the controversy, due to the death of the plaintiff.[15] In *Dawson* v. *Mays, Administrator,* 159 Ark. 331, 252 S. W. 33, 30 A. L. R., 1463, the rule which prohibits on principle the granting of a new trial to a defendant after the death of the plaintiff, applies

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[15] *Blain, et al.,* v. *Broussard* (Tex. Civ. App.), 99 S. W. (2d) 993, where wife, plaintiff, secured divorce, husband died, obtained motion for new trial and dismissed case, on appeal reversed.

Ledbetter v. *Ledbetter* (Tex. Civ. App.), 229 S. W. 576, defendant in divorce, died while case on appeal; appeals court held issues moot, "which can lead to no practical relief." Accord: *Day* v. *Nothingham,* 160 Ind. 408, 66 N. E. 998; *Beavers* v. *Bess,* 58 Ind. App. 287, 108 N. E. 266, husband secured divorce on constructive service of process, wife later appeared, sought to set aside the divorce on grounds of fraud in affidavit for such publication service, and want of notice to her, while on docket husband died, and administrator substituted for husband, and judgment entered setting aside divorce, on appeal was reversed. *Dwyer* v. *Nolan,* 82 P. 746; *Foy* v. *Smith Estate,* 81 P. (2d) 1065; *Kirschner* v. *Dietrich,* 110 Cal. 502, 42 P. 1064.

to granting the plaintiff a new trial in a divorce proceeding after the death of her husband.

2. Petitioners Were Denied Due Process of Law and Equal Protection of the Laws by the State Courts

The court granting the motion for new trial to relitigate the issues of a divorce after death of the plaintiff, did not have jurisdiction over the subject-matter, nor had jurisdiction over the deceased plaintiff, such judgment rendered here denying the deceased plaintiff his divorce and dismissing his original petition (R. 58-60) violated due process of law as defined by this Court under the Federal Constitution. *Wuchter* v. *Pizzutti*, 276 U. S. 13, 72 L. ed. 446, 451, states that the "foundation of jurisdiction is physical power" * * * "and in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let *fiction* deny fair play that can be secured only by a pretty close adhesion to fact."[16] The rendition of a judgment in the divorce action against the deceased plaintiff, who could not appear and prosecute his case, and due to the *personal nature* of the action, could not be represented by substitution, violates the universal fundamentals of due process of law, is against natural justice and the mere exertion of arbitrary power. It is absolutely void, no rights can be acquired under it, no rights can be divested by it, and the decree declaring Rose Esther Rimbow, respondent the "surviving widow" of the deceased Jesse Rimbow Sr., and that Zeola Martin Rimbow, petitioner, is not the "surviving widow "of her deceased husband, Jesse Rimbow Sr., after such action on the divorce case of her deceased husband (R. 59-60), and the divestment of her vested property rights in the estate

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[16] *Twining* v. *New Jersey*, 211 U. S. 78, 100; *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

of her deacesd husband, and the insurance proceeds (R. 60-65), and the denial of L. F. Huckaby and Selena J. Thomas, as the Huckaby Funeral Service petitioners, their vested contracts rights to $875 funeral bill, secured by liens on the Equitable policy of $1000 (R. 32-35) and on the Universal policies (R. 45-47),[17] deprived these petitioners of their property rights without due process of law, and denial to them of the equal protection of laws as declared by this Court under the Fourteenth Amendment to the Federal Constitution. *Earle* v. *McVeigh,* 91 U. S. 503, 507; *Pennoyer* v. *Neff,* 95 U. S. 714, 734; *Scott* v. *McNeal,* 154 U. S. 34, 46; *Truax* v. *Corrigan,* 257 U. S. 312; *Griffin* v. *Griffin,* 90 L. ed. (Adv.) 535, 538; *Hansberry* v. *Lee,* 85 L. ed. 22, 311 U. S. 32, 132 A. L. R. 741. *McDonald* v. *Mabee,* 243 U. S. 90, 91, 61 L. ed. 608, 609.

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[17] *Hatch* v. *Hatch,* 35 Tex. Civ. App. 373, 80 S. W. 411; *Cheeves* v. *Anders,* 87 Tex. 287, 28 S. W. 274, divorced wife, has no insurable interest in the life of her husband, although named beneficiary in the policies; such proceeds become payable to the estate, *Hancock Mutual Life Ins. Co.* v. *Sally* (Tex. Civ. App.), 163 S. W. (2d) 651. Respondent Rose Esther Rimbow had no insurable interest in these policies at the time of his death. It was conceded that the 2 Universal policies, sum of $534, the back salary of $260.54 were due the estate of Jesse Rimbow, Sr., and the Equitable Policy of $1000, was payable to the surviving widow if the named beneficiary failed (R. 143). In Texas Compensation insurance is payable one half to the widow of deceased employee, where children survive him as here, *Lee* v. *Lee,* 112 Tex. 392, 247 S. W. 828, hence upon his death Zeola Martin Rimbow as widow had vested interest in one-half of this insurance, *Greene* v. *White,* 153 S. W. (2d) 575, 137 Tex. 361, 136 A. L. R. 626, also one-half interest in the $260.54, and the proceeds of the Universal policies, supra, under the stipulation, and the entire interest in the Equitable $1000 subject to the lien of $875 by the Huckabys. Her husband's one-half interest in the former community homestead, she acquired on his death a one-third life estate interest it (R. 144). Art. 2571, Sec. 1, Vernon's Tex. Ann. Civ. St., Art. 2578, idem, provides for division of community property at death.

A. Rule 329 as Applied in the Instant Case Violates Due Process of Law and Denies to the Petitioners the Equal Protection of the Laws under the 14th Amendment.

The Constitution of Texas, 1876, gave to the Supreme Court the unrestricted power to make rules of civil procedure for itself and other courts of the State, Art. 5, section 25. The 15th Legislature which met after the adoption of the Constitution of 1876, despite the change of policy in this Constitution proceeded to enact a large number of procedural laws while organizing the new court system. The Supreme Court adopted its "Rules for the Courts of Texas" under Art. 5, section 25, as supplementary to the practice statutes then in force, see 47 Tex., pp. 597-641. The 46th Legislature, House Bill 108, May 15, 1939, "in order to confer upon and to relinquish to the Supreme Court • • • full rule-making power in civil judicial proceedings • • • repealed all laws and parts of laws governing practice and procedure in civil actions • • • effective on and after • • • September 1, 1941," pursuant to this act, Chapter 25 of the Acts of the 46th Legislature, Supreme Court enacted Rule 329, adopting in the same language what was formerly Art. 2236, R. S. 1925, with a few minor changes, not apropos here.[18]

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[18] Art. 2236, Vernon's Ann. Civ. St. Bill of Review.—"In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:

"1. The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. *The parties adversely interested in such judgment shall be* CITED as in other cases." (Sections 2 and 3 omitted.)

Rule 329, Vernon's Tex. Rules of Civil Proc.:

"Motion for New Trial on Judgment Following Citation by Publication.

It has been the policy of the Supreme Court of Texas, in construing these rules, where the language of the applicable statutes have been adopted, to give to the rule the same construction. *Hess & Skinner Engineering Co.* v. *Turney,* 203 S. W. 593, 109 Tex. 208. The rules enacted being by virtue of constitutional and statutory authority (see note 18, page 44, *supra*) by the court have the force and operation of statutes, and the same mandatory effect given to the statute, Art. 2236, applies to the Rule 329,[19] *Shelton Motor Co.* v. *Higdon* (Tex. Civ. App.) 140 S. W. (2d) 905, revd. on other grds., 157 S. W. 627. The uniform construction of Art. 2236, with its various enactments and in its present form as Rule 329, no matter how it has been designated to treat it as a "motion for new trial" permitted on a judgment obtained by constructive service, whenever the defendant in such judgment, attacks such judgment within two years after its rendition if he can conform to its terms. *O'Neill* v. *Brown,* 61 Tex. 34, see also note 12, page 39, *supra,* for other cases. These cases required the "adverse parties" to the judgment to be cited, and the court must have at the time such motion is filed jurisdiction of the same "subject-matter" as at the time the judgment was rendered

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"In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:

"(a) The court may grant a new trial upon *petition of the* petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases." ((b) and (c) omitted.)

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[19] *Brown* v. *Linkenhoger,* 153 S. W. (2d) 342 (Tex. Civ. App.) err. ref.; *Childress* v. *Robinson,* 161 S. W. 78 (Tex. Civ. App.) err. ref. Cases construing Rule 329: *Watts* v. *City of El Paso,* 183 S. W. (2d) 249, err. ref.; *Harris* v. *Elm Oil Co.,* 183 S. W. (2d) 216, err. ref.; *Deveraux* v. *Daube,* 185 S. W. (2d) 211, decisions by courts of civil appeals of Texas. See page 45, *supra,* note 18.

and entered, and that the effect of granting such motion was to restore the case in the same condition between the parties as the case stood at the time such judgment was rendered. "Good cause" as required [20] in Rule 329 as in the former art. 2236, is explained in note 20, page 46, *supra*. This is the first case in Texas, arising under Rule 329, or under superseded art. 2236, in which a judgment of divorce, obtained as here by constructive service of the defendant, in which the defendant, against whom such judgment of divorce was rendered (R. 73), appeared within the two years required by the rule, and filed her motion for new trial (R. 3-15), alleging that at the time the suit was filed, judgment as rendered, she was out of the state, temporarily in California, that she did not know about the suit until after the death of her former husband, Jesse Rimbow, Sr., also alleging what she considered grounds of a meritorious defense to the action, requested a new trial of the divorce suit, setting out the fact of his prior death, and also his marriage to Zeola Martin Rihbow, petitioner, setting out that she was proceeding under Rule 329 for new trial and by virtue of such rule, sought to invoke the jurisdiction of the court (R. 15). The trial court granted the relief asked for, granted the new trial retried the suit over on the petition of the deceased plaintiff (R. 74-77) and rendered judgment on this aspect of the case accordingly (R. 59-60). The Court of Civil Appeals [21] (R. 144-149), in affirming the

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[20] "Good cause" required by the Rule 329 as required by the former Art. 2236 (see note 18, p. 44, *supra*), has been uniformly construed to mean, the defendant must have had no actual notice of suit in time to appear and defend and before trial was had, and he must show a meritorious defense to the cause of action, which upon presentation would have probably resulted in a different judgment. Also he must show, that he did not know of the rendition of the judgment in time to attack it during the term at which rendered. *Childress* v. *Robinson, Watts* v. *City of El Paso, Harris* v. *Elm Oil Co., Devereaux* v. *Daube, supra,* note 19.

[21] Reported in 191 S. W. (2d) 89.

judgment of the trial court (R. 147), held that the court "clearly had jurisdiction over the parties and the subject-matter" in compliance with Rule 329, under appellees (respondent) as set forth in second amended motion, which although designated "Motion for New Trial on Judgment" following Citation by Publication, "was in substance and effect, a bill in equity, in the nature of the old "Bill of Review," that it at least conferred power on the court to determine the divorce judgment to be void, as having been procured by fraud upon both the defendant and the court therein, and to thereupon declare the appellee to be the surviving wife of the deceased, and to apportion the property he left accordingly" (R. 147). And in reply to the attack of lack of jurisdiction under Rule 329, the court said, that it could be conceded as true, that the court did not have authority to retry a divorce suit after the death of the plaintiff under Article 2236, Section 1, now Rule 329, Texas Rules of Civil Procedure, but it did have "the authority upon its unchallenged findings on the facts that the divorce was procured by fraud, even upon the court itself, was void, • • • "there being property rights at issue, as well as the marital status of the women involved, to determine the resulting effects upon the property." Finally that the jurisdiction of the court is determinable not by the evidence but by the pleadings [22] (R. 147).

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[22] Cases cited by court (R. 147-149). *Spann Brothers Auto Supply Co.* v. *Miles* (Tex. Civ. App.), 135 S. W. (2d) 1016, all parties before court, petition set out claim for county court jurisdiction at trial proved amount under $200, held jurisdiction determined by pleadings. *Clonts* v. *Johnson,* 294 S. W. 844, states that petition on face must disclose prima facie that the court has jurisdiction, court here had jurisdiction over the subject-matter and the parties.

States these cases support court's action: *Newcomb* v. *Newcomb,* 13 Bush (Ky) 544, 26 Am. Rep. 222, 57 L. R. A. 598, collateral attack on divorce after death, sustained on ground husband did not comply with codes & applicable statutes as shown in the judgment record. *Perez, et al.,* v. *E. P. Lipscomb & Co.* (Tex. Civ. App.), 267 S. W. 748, attack by

The second amended motion for new trial of the divorce suit, disclosed on its face, that it sought to retry a divorce suit, and admitted the death of the deceased plaintiff who had secured his divorce and died (R. 3-15). That is why the petitioners below urged their motion to dismiss the second motion for new trial by the respondent Rose Esther Rimbow, since it appeared in her motion that the court had lost jurisdiction over the subject-matter of the action and also could not acquire jurisdiction over the dead plaintiff. It was not necessary for the court to take evidence upon such admitted fact by all parties, including the movant. The validity of court action to render judgments, three

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demurrer upon a bill of review under art. 2236, land suit, heirs sued by publication, court held facts were alleged were sufficient for new trial and court erred in dismissing suit. *Jones* v. *Bartlett* (Tex. Civ. App.), 189 S. W. 1107, husband obtained divorce in Oklahoma against Texas wife by publication, after his death, wife attacked decree in Texas, on the ground that Oklahoma court did not have jurisdiction, under *Haddock* v. *Haddock* (followed by Texas court of appeals), 201 U. S. 562, trial court took evidence upon the judgment relating to jurisdiction of the Oklahoma court, and held that she was surviving widow. (See *Williams* v. *North Carolina* I (1942) 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, overruling *Haddock* v. *Haddock*, 201 U. S. 562. *Hardin* v. *Hardin*, 1 S. W. (2d) (Tex. Civ. App) 708, divorce obtained by husband in 1908, after his death, the wife in 1925, filed suit against heirs to his property, attacking divorce decree to have it declared void. Trial court granted retrial of issues relative to the divorce, reversed on appeal as not having the executors of his estate, but the court also observed that the action was barred by four year statute of limitations the original divorce documents were lost. Case is wrong if not distinguishable from instant case, see *Blain* v. *Broussard*, 99 S. W. (2d) 993 (Tex. Civ. App.); *Weaver, et al.*, v. *Garriety* (Tex. Civ. App.) 84 S. W. (2d) 878, land suit in which court refused to allow a collateral attack on divorce judgment, which gave certain property to the wife, as her separate property, and which was set aside by husband after her death in separate suit. Dictum by the court, asserted that trial court upon allegations of fraud after decease of wife, where the judgment changed the course of property rights, could set it aside, but not where the action was simply one for divorce. as the death of the wife, disposed of that issue.

1 Corpus Juris, 208-209, and 19 Corpus Juris 169-70, cites varying cases, conflicting, and in the main distinguishable, if not doubtful and irreconcilable with fundamental principles, nor in any of which does it appear that they were attacked as violating due process of law. Some

things must be shown, (a) competent court with power to hear the matter presented, (b) jurisdiction of the subject-matter of the action, and (c) jurisdiction over the parties against whom action is being taken. *Wetmore* v. *Karrick*, 205 U. S. 141, *Standard Oil Co.* v. *Mo.*, 224 U. S. 270, *Crawford* v. *McDonald*, 88 Tex. 626, 33 S. W. 325. Where the court assumes to act without such jurisdiction, such judgment is a mere nullity and be so treated whenever and wherever or for whatever purpose it is to be used. *Shelton* v. *Tiffin*, 6 How. 163, 12 L. ed. 387, *Hollingsworth* v. *Barbour*, 4 Pet. 466, 7 L. ed. 922, and all state courts so hold, see also *Glass* v. *Smith*, 66 Tex. 548, 2 S. W. 195; *Harris* v. *Graves*, 26 Tex. 577; *Tulane* v. *McKee*, 10 Tex. 335.

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of these cases contra to the principle upon which the court cites them. *Cheeley* v. *Clayton*, 110 U. S. 71, 28 L. Ed. 298, collateral attack on divorce decree in a district court of Colorado Territory, where record disclosed that the publication service was defective, which destroyed the court's jurisdiction, under the state court's decisions, hence set aside after the death of the husband as void. Compare with instant case. *Fox* v. *Fox, et al.*, 179 So. (Ala.) 237, collateral attack on divorce permitted in chancery, after death of spouse, *Sturm* v. *Cooper, et al.*, (Oregon) 28 Pac. (2d) 231, and *Lawrence* v. *Nelson*, 113 Iowa 277, 57 L. R. 583, 605, cases in which equitable attacks allowed on divorce judgments after death, represents the minority view, doubtful on principle. *Rose* v. *Rose*, 145 S. W. (2d) 773 (Tenn.) also doubtful and distinguishable. *Kirschner* v. *Dietrich*, 110 Cal. 502, holds that a divorce after death cannot be relitigated. *Raps* v. *Raps*, 125 P. (2d) 826, and *McGuinnes, Exctr, et al.*, v. *Superior Court of the City and etc.*, 40 A. L. R. 110, both from California hold that if the parties resume marital relations after conditional decrees and then secure final decrees of divorce, such action can void the judgment upon attack by injured spouses, even after their deaths. Doubtful, but the courts there distinguish such actions from the *Kirschner* v. *Dietrich, supra; Blain* v. *Broussard*, 99 S. W. (2d) 993 (Tex. Civ. App.) holds after death, no motion for new trial can be filed as court has lost jurisdiction of subject-matter and parties to divorce. Compare *Hardin* v. *Hardin*, 1 S. W. (2d) 708 (Tex. Civ. App.); *Dawson* v. *Mays*, 252 S. W. 33 (Ky), 30 A. L. R. 1463. *Dwyer* v. *Nolan*, 82 P. 746, *Beavers* v. *Bess*, 108 N. E. 266, *Ledbetter* v. *Ledbetter*, 229 S. W. 576 (Tex. Civ. App.), hold that death precludes attack on mere divorce action. Compare cases, 9 R. C. L. 458 and 1 L. R. A. (N.s.) 552. *E. L. Witt & Sons* v. *Smith*, 265 S. W. 1076, not applicable and distinguishable. *Smith* v. *Higginbothem*, 112 S. W. (2d) 770, construes Art. 2236 as motion for new trial, same effect, *Trujillo* v. *Piarote*, 53 S. W. (2d) 466.

The Court of Civil Appeals holding that treating the second amended motion for new trial by respondent Rose Esther Rimbow, as bill in equity in the nature of a bill of review, the trial court would have ample power to retry the divorce case after death of the plaintiff "on its unchallenged findings of fraud" and hold the judgment void and declare respondent Rimbow the surviving widow and dispose of the property on that basis. This is merely presuming jurisdiction by giving the motion for new trial a new name, and construing the judgment of the court below (R. 58-66) as merely setting aside the judgment by declaring it void after "finding fraud." The court is saying in effect that although the Rule 329, formerly art. 2236 is mandatory, if the court does not have jurisdiction under that rule, by merely construing the action as a bill in equity in the nature of the old bill of review, a divorce can be retried after the death of the plaintiff. But the court did not disclose that it is well settled in Texas, that a defendant cannot resort to equity for a new trial of case unless he can show that he has no remedy at law. *Birge* v. *Caldwell* (Tex. Civ. App.) 105 S. W. (2d) 407, *Herman Hospital Estate* (Tex. Comm. App.) 55 S. W .(2d) 505. Even suits in the nature of an equitable bill of review are treated in the same manner as a motion for new trial in the former suit if application therefor had been made while the court had power to hear a motion for new trial.[23] Jurisdiction is

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[23] *Cotten* v. *Stanford* (Tex. Civ. App.), 169 S. W. (2d) 489.

It is a rehearing on the merits of the cause, *Seguin* v. *Maverick*, 24 Tex. 535, 76 Am. Dec. 117, and provides a remedy in the nature of a bill of review where defendant has not had an opportunity to make a defense.

Loomis v. *Balch*, 181 S. W. (2d) 849 (Tex. Civ. App.), an equitable bill of review is also a motion for new trial. Motion to vacate a default judgment is a motion for new trial, *Arenstein* v. *Jencks*, 179 S. W. (2d) 831, err. dism. Accord, *Dollert* v. *Pratt-Hewitt Oil Corp.*, 179 S. W. (2d) 346 er. ref. A motion for new trial filed too late, unless conforms to bill of review, the court cannot set aside the judgment unless judgment is void, that is subject to collateral attack. *Bridgman* v. *Moore*, 183 S. W. (2d) 705 (Sup. Ct. of Texas). Compare *Brownson* v. *Reynolds*, 77 Tex. 254, 13 S. W. 986, 987.

required over the subject-matter and of the parties to the former judment before the court can exercise its equity powers.[24] *Kilian* v. *Kilian* (1945) Tex. Civ. App. 185 S. W. 2d. 611, where husband sued wife for divorce and got judgment upon service by publication, within two years the wife appeared and attacked the judgment, the husband was cited, and his attorney appeared at the trial, it was treated as a motion for new trial under Rule 329. In the instant case at bar, at the time the respondent filed her motion for new trial of the divorce case, the plaintiff was dead, the court below in its opinion states that the defendant can try the issues of the divorce suit after the death of the plaintiff by citing the deceased's children his widow. If the plaintiff is alive the action requires him to be cited, or appearance or substituted service by publication before the court with attempt to adjudicate on the issues. Here is a plain and arbitrary difference assumed to cover up the lack of jurisdiction to retry divorce suits after the death of the plaintiff. Clearly, the court approved what the trial court did, and this Court under due process of law and equal protection of the laws is concerned with substantial effects of judgments, and not what the court is saying, and will determine for itself whether such judgments as rendered violate due process of law under the 14th Amendment to the Federal Constitution. This Court is alert to evasions, no matter how fanciful or involved. *Rio Grande Irrigation and Colonization Co.* v. *Gildersleeve,* 174 U. S. 603, court rules cannot be dispensed with to fit a particular case. *Truax* v. *Corrigan,* 66 L. Ed. 254, application of the state statute to the facts as set out, the Supreme Court

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[24] *Strickland* v. *Ward,* 185 S. W. (2d) 736 (Tex. Civ. App.)
Rule 124, Vernon's Tex. Rules of Civil Procedure, provides that no judgment shall be rendered against any defendant, unless upon service, or acceptance of service or waiver of service or upon appearance by the defendant, as prescribed by these rules, except where otherwise expressly provided by law or these rules.

must analyze such facts and draw its own conclusions as to whether it violates the Federal Constitution. *Griffin* v. *Griffin,* 90 L. Ed. 535 (Adv.); *Hansberry* v. *Lee,* 311 U. S. 32; *Windsor* v. *McVeigh,* 93 U. S. 274; *Pennoyer* v. *Neff,* 95 U. S. 714; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329. Constitutional guarantees of the 14th Amendment cannot be evaded by form or fiction, *Simon* v. *Croft,* 182 U. S. 427, 436; *Wuchter* v. *Pizzutti,* 276 U. S. 13, 72 L. Ed. 446.

The foregoing cases of this Court establish the principles required by procedural due process of law guaranteed under the Federal Constitution and are applicable here. The physical inability of the court below to acquire jurisdiction over the deceased plaintiff, who since acquiring his divorce, died, removed the essential and necessary party and the subject-matter from the jurisdiction of the court, the setting aside of such judgment and relitigating the issues of divorce, as if the plaintiff were alive no matter from what source the court assumes power to act, and the petitioners whose property rights were adversely affected by such action, can invoke the constitutional guarantees of due process of law and the equal protection of the laws under the 14th Amendment to strike down such arbitrary exercise of judicial power. *U. S.* v. *Northern Pac. Ry. Co.,* 41 S. Ct. 439, 256 U. S. 51; *Nashville, C. & St. L. Ry.* v. *Browning,* 60 S. Ct. 968, 310 U. S. 362, 84 L. Ed. 1254. See also, *Rasmunsen* v. *Call,* 188 P. 275, 55 Utah 597; *Ward* v. *Hunter Machinery Co.,* 248 N. W. 864, 263 Mich. 445; *Scott* v. *McNeal,* 154 U. S. 34.

Conclusion

The importance of the questions of due process of law and the equal protection of the laws guaranteed under the Fourteenth Amendment to the Federal Constitution, duly

presented to and adversely determined by the courts below, require the exercise of the supervisory powers of this Court, in order that such basic fundamentals, which underlie all government action by any agency thereof, especially the courts, shall not be denied to any person.

Respectfully submitted,

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(4650)

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No. 146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ZEOLA MARTIN RIMBOW, SELENA J. THOMAS & L. F. HUCKABY, DOING BUSINESS IN THE FIRM NAME OF HUCKABY FUNERAL SERVICE, *Petitioners.*

v.

ROSE ESTHER RIMBOW, JESSE RIMBOW JR., BESSIE MAE RIMBOW, MINORS, ACTING BY THEIR GUARDIAN AD LITEM, HENRY E. KAHN, HENRY L. THOMPSON AND A. B. GERLAND, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent,
Rose Esther Rimbow,

HENRY E. KAHN,
Attorney for Respondents,
Bessie Mae Rimbow and
Jesse Rimbow Jr.

Of Counsel:
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YOUNG CO., HOUSTON

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No. 146

ZEOLA MARTIN RIMBOW, SELENA J. THOMAS & L. F. HUCKABY, DOING BUSINESS IN THE FIRM NAME OF HUCKABY FUNERAL SERVICE, *Petitioners.*

v.

ROSE ESTHER RIMBOW, JESSE RIMBOW JR., BESSIE MAE RIMBOW, MINORS, ACTING BY THEIR GUARDIAN AD LITEM, HENRY E. KAHN, HENRY L. THOMPSON AND A. B. GERLAND, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Respondents, Rose Esther Rimbow, Jesse Rimbow Jr. and Bessie Mae Rimbow, minors, in opposition to the petition for writ of certiorari in the above cause, respectfully submit to the Court:

The Application for Certiorari presents no Federal

question. It is well settled that the Laws of the Courts of last resort in the State in which the case is decided are binding on the Supreme Court. *Claxson Company v. Stentor Electric Manufacturing Company,* 313 U. S. 487-498; *J. Rob Griffin, Admr. v. McCoach,* 313 U. S. 498. The cause was tried under and by virtue of what is called Rule 329, which was promulgated by the Supreme Court and adopted and made the law by the legislature of the State of Texas; Rule 329 is the same as Article 2236 of the Revised Statutes of the State of Texas, which Rule and which Statute provide that in a case where defendant is cited by publication and the defendant does not make his appearance in court, that the defendant has two years in which to file a bill of review which was done in this case.

Therefore, all matters having been adjudicated by the Court of Civil Appeals and the Supreme Court of Texas, there is no assignment that can be considered by the United States Supreme Court and a writ of certiorari should, in all things, be refused. However, should the Court differ, we present the following:

STATEMENT.

Respondent, Rose Esther Rimbow's trial pleading was her second amended motion for new trial. (R. 3.) The following is a brief statement of the motion:

That on February 11th, 1944, Jesse Rimbow Sr., now deceased, filed suit for divorce against her in the 127th District Court of Harris County, Texas, and

on the 30th day of March, 1944, was awarded decree dissolving their bonds of matrimony; that said divorce judgment was void for the reason that service of process in said suit was had by publication solely on the following unsworn statement of Jesse Rimbow Sr., deceased, to-wit:

"Jesse Rimbow, plaintiff in the above entitled and numbered cause being duly sworn, says that the defendant's residence is unknown to affiant, and that he, the plaintiff, has made diligent effort to locate the defendant, but has been unsuccessful.

"Wherefore plaintiff prays the citation be issued by publication.

"(Signed) Jesse Rimbow.

"THE STATE OF TEXAS }
"COUNTY OF HARRIS }

"Before me, the undersigned authority, on this day personally appeared Jesse Rimbow, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

"Given under my hand and seal of office this 9th day of February, 1944, A. D.

"(Signed) HENRY L. THOMPSON

(SEAL) "Notary Public in and for Harris County, Texas." (R. 4-5.)

That all of the evidence of the said Jesse Rimbow Sr. upon which the judgment dissolving their bonds of matrimony was rendered, was totally false and taken verbatim from the Statement of Facts on file in said cause, is as follows:

"They remained wholly separated and apart by virtue of mistreatment of plaintiff by defendant; that the defendant commenced a course of unkind, harsh and tyrannical treatment which continued with very slight intermission until the separation took place, which was on or about the the 28th of December, 1943; that the defendant nagged plaintiff continuously which resulted in loss of his peace of mind; that defendant left him and abandoned him on or about December 28th, 1943, while they were in Houston, Texas, and that he has not seen nor heard from the defendant yet, and also that he has made diligent effort on many occasions to try to locate defendant, but has been unsuccessful; that defendant was a person of violent passions and ungovernable temper; that he could no longer live with defendant, even though she had not abandoned him." (R. 5-6.)

That she and Jesse Rimbow were married in 1934, and lived together as husband and wife until December 28th, 1943, and that she had always done her part by him as his wife; that on December 25th, 1943, at their home at 4309 Lillie Street, in Houston, Texas, without fault on her part, he severely struck her in the back of her head with a chair and knocked her to the floor, and cut a deep gash in her head; that she was then frail and in ill health; that he was sorry for having struck her and on that evening arranged for her to take a trip to be with her sister, Gladys Mason, in Los Angeles, California, for a month or two to rest up and get well, and then come back home. That on December 28th, 1943, she went direct from Houston, Texas, to Los Angeles, and was there with her sister from then on until his death; that he had sent her

there, paying her fare, to stay until he would send her the money on which to come back, but that he never sent her the money to come home on. (R. 6-7.)

That said statement and purported affidavit by Jesse Rimbow, Sr., deceased, as the basis for said citation of service by publication, "that the defendant's residence was unknown to him" was absolutely false and known by him to be false at the time he made it, that it was made to avoid personal service of citation on her, and to keep her from knowing about the suit for divorce against her. The said purported false certificate that the residence of the defendant was unknown to him, was a fraud on the court and the jurisdiction thereof. That by making false certificate, he prevented her from knowing of said suit; that if she had been personally cited in the case, or known thereof in time, she would have filed an answer therein, and would have contested the suit, and would have defeated him therein. (R. 7-8.)

That on the 2nd day of April, 1944, Jesse Rimbow Sr., now deceased, married the defendant, Zeola Martin Rimbow, in Harris County, Texas. That for many years prior to and at the time she left for Los Angeles, she and Jesse Rimbow Sr. owned as their community property, their home at 4309 Lillie Street, in Houston, Texas, and lived in it, it being of the reasonable value of $2000.00, and was completely paid for before the death of the said Jesse Rimbow Sr., deceased. That for more than a week before the suit for divorce was filed, and continuously until Jesse Rimbow Sr. married Zeola Martin Rimbow, the said

Zeola Martin Rimbow lived in adultery with the said Jesse Rimbow Sr., in their said home at 4309 Lillie Street, in Houston, Texas, all of which was unknown to Rose Esther Rimbow, the appellee herein. That the said Zeola Martin Rimbow well knew at all times material that Jesse Rimbow Sr. was married to the appellee, Rose Esther Rimbow, and that she knew of said divorce against her at the time it was filed, and when the judgment was entered granting the divorce. (R. 8-9.)

Appellee was not present at the trial of the divorce suit on the 30th of March, 1944, and did not appear there by an attorney of her own selection, nor in any other manner, that she did not know of the case until the 13th of April, 1944, when Jesse Rimbow Sr. was already dead. That if she had known of the suit she would have successfully contested the case; that she had a good defense against the suit because the evidence given by Jesse Rimbow Sr. in support of his divorce suit was false and that he never had any grounds for divorce against her. That if she was cruel to him, he had condoned her cruelty. That she, however, denies that she was ever cruel to him. That from the time she left for California on December 28th, 1943, until after he filed suit against her on February 9th, 1944, they corresponded with each other, he writing her three letters over that period, and she writing him five letters over that period, and by letter of date the 28th of January, 1944, he stated to her that he would send her the money with which to return to him from California when he received his

back pay from his employer. That in the letters they were affectionate to each other. That Zeola Martin Rimbow lured Jesse Rimbow Sr. away from appellee, Rose Esther Rimbow. (R. 9-12.)

That on the 9th day of April, 1944, Jesse Rimbow Sr. was injured while working for the American Rolling Mill Company, Houston, Texas, and died as the result of said injuries, and that his employer was covered because of said injury by workmen's compensation insurance issued and carried by the American General Insurance Company, and that the surviving widow of Jesee Rimbow Sr., deceased, was entitled to $9.41 per week for 360 weeks, compensation insurance from the American General Insurance Company. That Jesse Rimbow Sr. had only two children, Jesse Rimbow Jr. and Bessie Mae Rimbow, minors, who were entitled each to a one-fourth of said compensation insurance. (R. 12-13.)

That at the time of the death of the said Jesse Rimbow Sr., deceased, he was covered with a policy of life insurance in the amount of $1000.00 issued by the Equitable Life Assurance Society in which she was the named beneficiary. (R. 12.)

That at the death of Jesse Rimbow Sr. deceased, he was covered with two policies of life insurance issued by the Universal Life & Accident Insurance Company, one for $292.00, and the other for $240.00, and in which she was the named beneficiary. (R. 13.)

Petitioners on page 8, erroneously state that said policies were payable to the estate of Jesse Rimbow

Sr., deceased. See answer of Huckaby Funeral Home, page 46 of the record where the funeral home alleged that these policies are payable to Rose Esther Rimbow, as the designated beneficiary.

Jesse Rimbow Sr., deceased, died intestate, and no administration was had on his estate, and none was necessary, and that his estate owed but one debt, viz: the funeral bill to the Huckaby Funeral Home for burying his body. That amount of the claim, to-wit: $875.00 by said funeral home was exhorbitant and that the reasonable value of said funeral services did not exceed $250.00. (R. 13-14.)

That she was entitled to judgment setting aside and holding for naught the judgment rendered by the court dissolving the bonds of matrimony between her and Jesse Rimbow, Sr., deceased, and to be adjudged the surviving widow of the said Jesse Rimbow, Sr., deceased, and to grant her a new trial, and to judgment for a homestead interest for life in the home of herself and Jesse Rimbow, Sr., deceased, to judgment against the cross defendant American General Insurance Company, for compensation insurance at the rate of $9.41 per week for 360 weeks; to judgment against the cross defendant Universal Life Insurance Company in the sum of $531.80; and to judgment against the cross defendant, the Equitable Life Assurance Society of the United States, in the sum of $1000.00; and for all of which she prayed judgment. Her motion was sworn to by her. (R. 14.)

Zeola Martin Rimbow, petitioner, whom Jesse Rimbow Sr. married after divorcing the respondent, Rose

Esther Rimbow, Bessie Mae Rimbow, minor child of Jesse Rimbow Sr., by his first marriage, and Jesse Rimbow Jr., minor child of Jesse Rimbow Sr., and Rose Esther Rimbow, his only possible legal heirs, among others, were made the adverse parties defendants in said second amended motion for a new trial. (R. 3.)

The following are the material parts of the judgment of the trial court: (R. 58) "and all of said parties announced ready for trial and no jury having been demanded, said motion for a new trial and also the petition and cause of Jesse Rimbow Sr., deceased, to dissolve the bonds of matrimony between him and this defendant and cross plaintiff, Rose Esther Rimbow, were submitted to the court for adjudication upon the matters of fact as well as of law, and the court having heard the pleadings, evidence and argument of counsel, finds the material allegations in defendant and cross plaintiff, Rose Esther Rimbow's second amended motion for a new trial, true, and finds for defendant and cross plaintiff Rose Esther Rimbow, on both of said causes, and grants said motion for a new trial and now sets aside and holds for naught the judgment of this court heretofore rendered herein of date March 30th, 1944, dissolving the bonds of matrimony between Jesse Rimbow Sr., deceased, and the defendant and cross plaintiff, Rose Esther Rimbow. And it is further considered by this court and so ORDERED, ADJUDGED and DECREED by the court that the said Jesse Rimbow Sr., deceased's petition and cause to dissolve the bonds of matrimony between him and the defendant

and cross plaintiff, Rose Esther Rimbow, be and the same is here now forever denied, and the defendant and cross plaintiff, Rose Esther Rimbow, as to said suit for divorce against her by Jesse Rimbow Sr., deceased, go hence without day; and it is further considered by this court and so ORDERED, ADJUDGED and DECREED by the court that the defendant and cross plaintiff, Rose Esther Rimbow, be and is hereby adjudged to be the surviving widow of the said Jesse Rimbow Sr., deceased, and that the cross defendant, Zeola Martin Rimbow, is not the surviving widow of Jesse Rimbow Sr., deceased." (R. 59-60.)

Judgment against the Universal Life Insurance Company for the clear balance of $481.80 (R. 60), and against the Equitable Life Insurance Company for a clear amount of $935.00 life insurance (R. 61), and against the American Rolling Mill Company for $260.54 (R. 63), and against the American General Insurance Company for $5637.58, compensation insurance (R. 63).

The court thereupon ordered paid out of said judgment the attorneys' fees and the funeral bill of $475.00 and awarded to Rose Esther Rimbow one-half and to each Bessie Mae Rimbow and Jesse Rimbow Jr., a one-fourth of the balance in the registry of the court. Rose Esther Rimbow was awarded a homestead interest for life in the home of Jesse Rimbow Sr., and Rose Esther Rimbow. (R. 64-66).

ARGUMENT.

Respondents' Reply to Petitioners' Specification of Error.

Petitioners' specification of error is that the court, in annulling the divorce judgment by Jesse Rimbow Sr., deceased, against respondent, Rose Esther Rimbow, was without the proper party plaintiff and the subject matter therein, Jesse Rimbow Sr., he then being dead, therefore without jurisdiction to annul the divorce judgment; and that Rule 329 of the Texas Rules of Civil Procedure (the procedural statute pursued by Rose Esther Rimbow in anulling the divorce judgment) as applied by the court, was in violation of due process and the equal protection of the law, under Section 1 of the 14th Amendment to the Federal Constitution.

Petitioners in their appeal to the state courts did not assail and do not now assail the sufficiency of the evidence to sustain the allegations of respondent, Rose Esther Rimbow's second amended motion for a new trial and the judgment of the court; and petitioners predicated their appeal in the state courts and predicate their petition here on the sole ground that the trial court in the proceeding annulling the divorce judgment, did not have jurisdiction of the party plaintiff and of the subject matter in the divorce case,—the plaintiff in the divorce case, Jesse Rimbow Sr., having died before Rose Esther Rimbow, the defendant in the divorce case, and respondent herein, filed her proceeding to set aside the judgment of divorce. Jurisdiction is determined not by the evidence, but solely

by the pleadings, the averments in Rose Esther Rimbow's second amended motion for a new trial. *Spann Bros. Auto Supply Co. v. Miles,* 135 S.W.2d 1016; *Clontz v. Johnson,* 294 S.W., 844.

Her original motion for a new trial was filed on May 5th, 1944 (R. 81); and her second amended motion for a new trial was filed on January 20th, 1945. (R. 3.)

Briefly, appellee, Rose Esther Rimbow, and Jesse Rimbow Sr., had been husband and wife for ten years at the time suit was filed for divorce by him against her. They had accumulated a home located at 4309 Lillie Street, Houston, Texas, in which they were living for years continuously up to the time that Rimbow sent her to Los Angeles, California, to be with her sister, Gladys Mason, for a month or two to regain her health, and in a way to compensate for his cruelty in ruthlessly knocking her to the floor with a chair on Christmas Day in 1943. That she was a faithful wife and he had no grounds for divorce against her. That he wrote her several letters over the period from December 28th, 1943, when she was sent to California until the 28th of January, 1944, when he wrote her that he would send her the money on which to return when he collected his back pay; she continued to write him after February 9th, 1944, when suit for divorce was filed against her. Their letters to each other were affectionate in nature. That he purposely had her cited by publication to prevent her from knowing of the divorce suit against her and falsely made an affi-

davit as a basis for the constructive process "that her residence was unknown to him" as is afforded by Rule 109 Vernon's Texas Rules of Civil Procedure, as a basis for citation by publication. That he procured the divorce on a totally false statement of facts, and on the 9th of February, 1944, when he filed said suit for divorce, he was living in adultery with the petitioner herein, Zeola Martin Rimbow, in the home owned by him and Rose Esther Rimbow, and which they shortly prior thereto occupied as husband and wife.

On the date that he falsely made the purported affidavit that he did not know her residence as a basis for the constructive service, she was a sick woman, wounded in mind and body at his hand, and in Los Angeles at his will and under his control, for he was then the husband at the head of their household, in the possession of their home and their money on which she should return. She was at the time of the false affidavit and filing of the divorce suit, neither absent from the state, nor a non resident of it, but a resident of Houston, Texas, and her residence was then well known to plaintiff, Jesse Rimbow Sr.

> "*Newcomb v. Newcomb*, 13 Bush 544, 26 Am. Rep., 222, 57 L. R. A., page 598, was an action in equity instituted by an incompetent by her next friend, claiming as widow of a deceased person a right to dower in his realty and her distributable share of his personalty, a decree of divorce obtained by the husband prior to his death, which was set up in bar of the present action, was attacked as void upon the ground, among others,

that it was obtained upon constructive service of process, and that, the husband having placed his wife in an asylum in another state, and she being under his control and subject to his will, she was neither a non-resident nor absent from the state in the sense of the statute authorizing constructive service of process. The court held that a decree of divorce thus obtained was void, and subject to collateral attack when pleaded as a defense in an action to recover dower and distribution in the husband's estate, and this notwithstanding the husband had married a second time."

Appellee, Rose Esther Rimbow's action was in the nature of a motion for a new trial as is provided by Rule 329 of Texas Rules of Procedure, formerly Article 2236 of the Texas Revised Civil Statutes, which is in part as follows: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:

"(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases."

Petitioner herein, Zeola Martin Rimbow, who was married to Jesse Rimbow Sr. at his death, and his two children, Jesse Rimbow Jr. and Bessie Mae Rimbow, his only possible legal heirs, were the parties defendant adversely interested in the motion for new trial.

Proof by Rose Esther Rimbow that Jesse Rimbow Sr., deceased, had no valid ground for divorce against

her, constituted the good cause in the case, and the proceeding was a motion for a new trial. *Smith v. Higginbotham,* 112 S.W.2d 770; see page 773; 141 S.W.2d 752. The divorce judgment would not have become final until two years after it was rendered. *Trugillo v. Piarote et al.,* 53 S.W.2d 466, by the Commission of Appeals. Her attack on the judgment for divorce was not only a direct attack, but in the nature of a motion for a new trial. *Perez et al. v. E. P. Lipscomb & Co.,* 267 S. W. 748, writ of error refused. In the latter case, plaintiffs as a basis for process by publication made a false oath that they did not know the residence of the defendant and the court held that the judgment predicated on such service was absolutely void.

It was the fraud in procuring the divorce by a false affidavit, as a basis for the constructive process, and false testimony, in procuring the divorce, and respondent, Rose Esther Rimbow's suit for the homestead interest in their home and for the life and compensation insurance, that gave the trial court jurisdiction to grant the relief it did in her motion for a new trial. Only as the surviving wife or widow of Jesse Rimbow Sr., deceased, plaintiff in the divorce, could she take a homestead interest for life in their homestead (Art. 3496 Texas Revised Civil Statutes), take one-half of the compensation insurance (Texas Revised Civil Statutes, Art. 8306, Sec. 8a) and collect the life insurance in which she was the named beneficiary on his life, for otherwise she would have no insurable interest in his life. *Whitselle v. Northwestern Mutual Life Ins. Co.,* 221 S.W., 222. The court found that

she gave one-half of the life insurance to Jesse Rimbow Jr. and Bessie Mae Rimbow, children of Jesse Rimbow Sr., deceased, hence in the judgment there was awarded to Rose Esther Rimbow, respondent herein, one-half, and to the children each a one-fourth of the life and compensation insurance, being the cash proceeds in the registry of the court, after paying funeral bill and attorneys' fees. Had she in the motion simply asked to set the divorce aside, without suing for the property rights, her case would fall, because the courts will not busy themselves for sentimental purposes alone to retry a divorce case where the plaintiff has already died, for death has effectually already separated them.

In 1 Corpus Juris., pages 208 and 209, is the following:

> "From the very nature of things a cause of action does not survive the death of a party, where the only relief sought is a dissolution of the marriage relation by divorce, as death effectuates the very end which it is the purpose of the suit to accomplish; and therefore a cause of action for divorce or a pending suit therefor does not survive the death of either party, except in so far as property rights are involved. * * * *
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> "But where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution. * * * *

"An action may be maintained to set aside a decree of divorce fraudulently obtained, even after the death of the party, obtaining such decree."

In 19 Corpus Juris., pages 169-170, is the following:

"Death of party obtaining divorce. Although the death of one of the parties, whose only object is to sever the matrimonial bonds existing between them, abates the action, for which reason some authorities contend that no decree can be vacated in a direct proceeding after the death of plaintiffs, yet by the weight of authority, for the purpose of establishing property rights, the courts may vacate a decree even after complainant's death, where it was obtained by fraud and imposition on the part of complainant."

In *Cheely v. Cheely,* 110 U. S., 701, 28 Law ed. 298, 4 Sup. Ct. rep. 328, the United States Supreme Court held void a divorce judgment in the tate of Colorado, and decreed the defendant wife in the divorce judgment the surviving widow of the deceased plaintiff therein, and awarded to her one-half of the realty of the estate of the deceased plaintiff as his wife and heir, and as such, under the descent and distribution laws of Colorado, notwithstanding that the plaintiff in the divorce judgment had married again and left by his second wife, two children. The divorce judgment was held void because it was procured by defective service of citation by publication. On page 299, the court stated: "The true question in this case is which of the two Sarah A. Claytons was the lawful wife of James A. Clayton at the time of his death,

and as such, entitled by the statutes of Colorado to inherit one-half of his estate."

In the following cases, divorce judgments were annulled at the instance of the defendant wives, after the deaths of the plaintiff husbands, to entitle the defendant wives to share in the property of their deceased husbands, as their surviving widows and heirs at law, viz: *Hardin v. Hardin,* 1st S.W.2d, 708, Texas Court of Civil Appeals. Defendant wife was not served with process, and did not know of the divorce until 17 years thereafter and after her husband's death: divorce was procured by fraud: *Fox et al. v. Fox,* 179 So., 237, Supreme Court of Alabama, in 1938. Process was by publication on a false affidavit and the divorce procured on false testimony: *Sturm v. Cooper et al.,* 28 Pac.2d 231 by the Supreme Court of Oregon, in 1934. Process was by publication on a false affidavit and the judgment procured on false testimony: *Lawrence v. Nelson,* 113 Iowa, 277, 57 L. R. A., 582. Process was by publication on a false affidavit and the judgment procured on false testimony. Divorce annulled to entitle defendant wife, as his widow, to a government pension on the life of the plaintiff, deceased: *Reel v. Elder,* 62 Pa., 308, 1 Am. Rep. 414. Divorce judgment obtained by publication in a foreign state held void and set aside because of lack of jurisdiction in the court granting it: *Fidelity Insurance Co.'s Appeal,* 93 Pa., 242. Divorce was vacated for fraud in obtaining it 13 years after the decree was entered, without notice to defendant wife, she not knowing thereof until after his death: *Re*

House, 2 Connolly, 524, 14 N. Y. Sup. 275. Divorce obtained in another state, was held void in New York as against the wife who was not personally served; the husband had married again and died, and in a contest between the two wives the defendant wife in the divorce case, was held entitled to be appointed administratrix.

In *Brown v. Grove,* 116 Ind. 84, 18 N. E., 387, divorce judgment was set aside at the instance of the defendant wife, after the death of her husband, 20 years after the decree, because of the fraud of the husband in filing suit against himself in her name, without her knowledge, and procured the divorce judgment on his answer thereto. *Mefford v. Mefford,* 26 S.W.2d, 804, by St. Louis Court of Appeals. Plaintiff was awarded annullment of the divorce theretofore procured by her to entitle her to inherit her husband's property, as his surviving widow and heir, because of promises by the deceased husband in connection with the divorce, to give her certain property which he was prevented from doing by sudden death. *Riley v. Riley,* 25 S.W.2d, 59, by the Appellate Court of Kentucky. Divorce judgment was set aside on appeal after the death of the plaintiff husband, because of fraud in procuring the divorce and to entitle the wife to share in the property of the plaintiff husband, as his surviving widow and heir. *Gato v. Christian,* 92 At., 489, by the Supreme Judicial Court of Maine. Divorce judgment procured by the plaintiff wife, after her death, was annulled at the instance of the defendant husband, because of a mistake of

the court in rendering judgment for divorce. In *Raps v. Raps,* 125 Pac.2d, 826, and *McGuinnes Exr. Etc. of James S. White et al. v. Superior Court of the City and County of San Francisco,* 40 A. L. R., 1110, by the Supreme Court of California, divorce decrees were set aside at the instance of the parties against whom the decrees were rendered, for fraud upon the courts, after the deaths of the parties procuring the divorce judgments. *Rose v. Rose,* 145 S.W.2d, 773, Supreme Court of Tennessee. Petition to annul divorce at the instance of the defendant wife against the deceased husband plaintiff, was denied because there was no property of the deceased husband plaintiff, in Tennessee, but the court on page 774, 3rd paragraph, stated, "we think the weight of authority is that a decree of divorce may be set aside for want of jurisdiction or fraud even though the parties so obtaining such decree be dead, if property rights are involved"; citing numerous cases. *Beavers vs. Bess,* 58 Ind. App., 287, 108 N.E., 266, held proceedings annulling the divorce after the plaintiff husband's death, without property rights being adjudicated therein, was void, but that if in the annullment proceedings, property rights had been adjudicated, the annullment proceedings would have been valid, citing cases.

The courts of the states are unanimous, in the absence of statutory qualifications, with the possible exception of *Nolan v. Dwyer,* 1 L. R. A., N.S., 551, from the State of Washington, that a decree of divorce will be vacated for lack of jurisdiction or fraud at the instance of the defendant when the annullment

proceedings are brought promptly, and where the sole purpose of annullment proceeding is to determine property rights for the defendant in the divorce proceeding. In *Nolan v. Dwyer,* the court refused to vacate the judgment for divorce, stating that it had no jurisdiction of the party plaintiff, who had died. In that case, there was no suit for property rights. On page 554, 1 L. R. A., N.S., in the opinion, is the following: "so far as the property rights are concerned, if there are any, if the judgment is void, such rights are in no way affected by it and all the avenues are open for the determination of such rights where the parties affected, can all be heard." It appears that the court was unwilling to vacate the judgment of divorce, but that if the judgment was void, to determine the property rights accordingly, where the parties affected could all be heard. Determination of property rights is the sole purpose in the fact case, as in practically all other cases where divorce judgments were annulled, after the death of a party thereto. In the fact case, death had already effectually separated the parties. Setting aside the divorce judgment is a matter of form, the means, not the end, to determine the property rights.

The author of 1 L. R. A., N.S., on page 552, states, "Nolan v. Dwyer stands almost alone, since the authorities, as shown by the note in 57 L. R. A. 583, where the subject is treated at length, are practically unanimous that, in the absence of statutory qualifications, a decree of divorce may be vacated for lack of jurisdiction or for fraud, notwithstanding the death

of one of the parties thereto, where property rights are involved." * * * Cases are cited.

In *Israel v. Arthur,* 6 Colo., 85, and 7 Colo., 12, 1 Pac., 442, it was contended that a writ of error would not lie in an appeal for the wife from a divorce judgment after the death of her husband, on the ground that after the husband's death, there was no one who could represent him in this relation, because the bonds of matrimony had been dissolved by death. The court said if a decree of divorce affected the marriage relation only, there would be force in the argument; but when it was considered that a decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally. The decree of the divorce was reversed.

The plaintiff in divorce, having died, all of his possible legal heirs were substituted as parties in his stead, just as is done in any ordinary lawsuit, where plaintiff or defendant dies in the course of litigation. *O'Neill v. Brown,* 61 Texas, 34, was a proceeding under Rule 329. Upon the plaintiff's death, his administratrix was the substituted party for the deceased plaintiff therein. The court was not without jurisdiction for lack of parties in the annullment proceedings, as is contended for by petitioner herein.

On page 38 of their petition, petitioners state, "The trial court granted the motion as prayed for * * * * and refused to recognize the liens of the petitioners

A. L. Huckaby and Selina J. Thomas, doing business under the firm name of Huckaby Funeral Service on the insurance policies, and arbitrarily awarded them $475.00 for burial expenses in lieu of their contract rights to $875.00." Respondent, Rose Esther Rimbow, plead that the funeral bill of the Huckaby Funeral Home for burying the body of her deceased husband, Jesse Rimbow Sr., deceased, for $875.00 was exhorbitant, and that the reasonable value of the funeral services did not exceed $250.00. (R. 13-14.) A. L. Huckaby, the funeral director (R. 126-136), of the Statement of Facts, refused to tell what the casket was made of, what it cost, where he bought it, and what the reasonable cost of embalming the body was. The workmen's compensation insurance was the sole property of the beneficiaries, Art. 8306, Sec. 8a and Sec. 9, R. C. S. The life insurance was no part of Jesse Rimbow Sr.'s estate. The $260.54 due by the American Rolling Mill Company was the only property of the estate that could be used to pay the funeral bill together with $250.00 out of the compensation insurance.

In *Goethe v. McCollum,* 94 S.W.2d, 781, held that where a funeral bill was made by a member of a family, it must first be reasonable and then in proportion to the estate of the deceased whose body is being buried. It was a question of fact as to whether the funeral bill was unreasonable and out of proportion to the estate left by the deceased, and the court did not arbitrarily award the $475.00 for burial expenses.

Respondents submit that the contentions advanced

in the petition for certiorari are fanciful, frivolous, and without merit, and have already been substantially and thoroughly settled by this Court. Wherefore the respondents respectfully pray the court that the petition for certiorari be denied.

Respectfully submitted,

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